No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

Appeal from the United States District Court for the Eastern District of Michigan

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BRIEF FOR APPELLANTS

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OPINION BELOW

The opinion of the specially constituted district court of three judges (R. 196) is reported in 189 F. Supp. 942. The report of the Interstate Commerce Commission (R. 10) is published in 312 I.C.C. 185.

JURISDICTION

The final judgment and order of the United States District Court for the Eastern District of Michigan sitting as a specially constituted statutory district court of three judges was dated and entered on December 19, 1960. (R. 204). Notice of appeal was filed with the District Court on

January 9, 1961. (R. 205) The jurisdiction of this Court to review on appeal the final judgment and order of the District Court is conferred by 28 U.S.C. § 1253, 62 Stat. 926. An application for stay of the dissolution of a temporary restraining order entered by the District Court on October 14, 1960, preserving the employment status quo on the railroads involved, was filed with this Court on January 10, 1961. By order of this Court entered January 23, 1961, the stay was denied without prejudice to its renewal upon prompt docketing of this appeal. This appeal was docketed and the request for stay was renewed on January 27, 1961. This Court noted probable jurisdiction and granted the application for stay on February 20, 1961.

QUESTIONS PRESENTED

This case involves the proper interpretation of Sec. 5(2)(f) of the Interstate Commerce Act[1] and particularly the second sentence of that provision. In terms of the facts of this case, the questions presented are as follows:

> 1. Whether the Interstate Commerce Commission in its order approving the merger of the Erie and the DL&W violated the requirements of Section 5(2)(f) of the Interstate Commerce Act [49 U.S.C. 5(2)(f)] which section requires a fair and equitable arrangement for the protection of employee interests and as a minimum basis of such arrangement specifies that no employees of railroad carriers affected thereby shall be placed "in a worse position with respect to their employment" for a period of up to four years from the effective date of the Commission's order, depending upon the length of the employees' service, when its order approved the said merger subject to an arrangement which provides partial financial compensation for employees *after* and on specific condition that their

[1] Herein sometimes referred to as the Act.

position with respect to their employment has been worsened.

2. Whether railroad employees will be placed in a worse position with respect to their employment when, as a result of the Commission's order approving the Erie-DL&W merger, they will be deprived of their employment; placed in lower paying less desirable positions; forced to exercise their seniority rights and displace or deprive fellow junior employees of their jobs and be displaced or deprived of their jobs by fellow senior employees; forced to move their families to new places of employment, not once but an indefinite number of times during a five-year period following Commission approval until all job abolishments and displacements resulting from the merger have taken place, notwithstanding the fact that such order grants partial financial compensation to such employees *after* these effects have occurred.

3. Whether the Interstate Commerce Commission, and the District Court in upholding the Commission, misinterpreted the plain language of Section 5(2)(f), ignored the intent and purpose of Congress in enacting that provision into law and failed to apply the clear interpretation of that provision as set forth by this Court in its decisions in *Railway Labor Executives' Association* v. *United States*, 339 U. S. 142, 70 S. Ct. 530, 94 L. Ed. 721, and *The Order of Railroad Telegraphers* v. *The Chicago and North Western Railway Company*, 362 U. S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774.

4. Whether Section 5(2)(f) requires that railroad mergers be approved only upon such terms and conditions as will continue the current employees in equivalent employment for the prescribed period and will permit the economies to be realized at the expense of employees to be achieved only as the current forces are

reduced by natural attrition, i.e., as deaths, retirements, resignations, etc., occur.

An additional question, unrelated to those just listed, is:

5. Whether the statutory three-judge court erred in refusing to consider the sworn testimony of appellants' witness while accepting and relying upon excerpts from briefs and magazine articles, none of which were part of the record before the Commission or the court.

STATUTE INVOLVED

The statutory provision involved is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C. § 5(2)(f), which provides as follows:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

STATEMENT

In this case the Interstate Commerce Commission[2] approved the first of a series of major railroad mergers which seriously threaten the welfare and morale of the great majority of the employees who make up the railroad labor force of this country.[3] (R. 76-77). The United States and the Interstate Commerce Commission in their joint brief to the District Court pointed out that there are now in various stages of consideration seven additional mergers involving the Seaboard Air Line Railroad Company; the Atlantic Coast Line; the New York Central; Baltimore and Ohio; Chesapeake and Ohio; Chicago, Burlington and Quincy; Great Northern; Northern Pacific; Spokane, Portland and Seattle; Norfolk and Western; New York, Chicago and St. Louis (Nickel Plate); the Wabash; Southern; Central of Georgia; Atchison, Topeka and Santa Fe; Western Pacific; Southern Pacific; Milwaukee; and Rock Island.

In addition, the New York Central and Pennsylvania have explored a possible merger of their roads; the Pennsylvania recently filed an application with the Commission to acquire control of the Lehigh Valley Railroad and has indicated that it will attempt a merger with the Norfolk and Western after the latter railroad obtains through merger the Nickel Plate and the Wabash; and the Commission has recently approved one merger involving the Soo Line, Wisconsin Central and the Duluth, South Shore and Atlantic and a second involving the Chicago and North Western and the Minneapolis and St. Louis.

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[2] Herein called the Commission.

[3] Prior to the filing of the merger application in this case the Commission had approved the merger of the Norfolk and Western Railroad Company and the Virginian Railway Company. In that case, however, the railroads executed an agreement with the Railway Labor Executives' Association protecting the employment of all employees involved. Efforts by the Association to secure a similar agreement in this case have proved unavailing.

Little imagination is needed to picture the severe and extensive adverse effects that approval of such mergers will have on the morale and welfare of the railroad labor force unless the type of protection intended by Congress under Section 5(2)(f) is provided.

The present case began when the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company[4] on July 6, 1959, filed a joint application with the Commission under Section 5(2), and other sections of the Act not here pertinent, to merge the properties and franchise of the DL&W into the Erie. The Railway Labor Executives' Association[5] intervened in the proceeding to protect the interest of the employees of those railroads who are represented by the various labor railway organizations, the chief executive officers of which are members of the Association.

A hearing was held on the joint application for merger before a Commission hearing examiner. At the hearing evidence was submitted by the railroad applicants regarding their intentions with respect to employees. The evidence indicated that the merger would require five years to consummate subsequent to Commission approval. During the first year following Commission approval, according to the evidence, the merged railroad has planned to abolish 403 jobs and transfer another 430 jobs to points requiring the employees holding those jobs to move their homes; during the second year 818 jobs would be abolished and 958 jobs would be transferred; the third year would find 484 jobs abolished and 481 jobs transferred; the fourth year would see 190 jobs abolished and 191 jobs transferred; finally, during the fifth year 87 jobs would be abolished and 99 would be transferred. The total for the five-year period would be 1,982 jobs abolished and 2,159 jobs transferred. (R. 112).

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[4] Herein referred to as the Erie, the DL&W or the railroads.

[5] Referred to herein as the RLEA or the Association.

On brief to the hearing examiner the RLEA contended that sub-paragraph (f) of Section 5(2) must now be applied as it originally was intended to be applied and that subparagraph (f) meant what it plainly said in providing that as a result of a merger no employees will be placed "in a worse position with respect to their employment" for four years from the effective date of the Commission's order or less depending upon the period of their previous service. The Association contended that for the prescribed period the Commission was required to condition the merger upon the railroad's providing comparable jobs at comparable pay with such savings as were to be realized at the expense of employees to be secured through natural attrition, that is as deaths, retirements, resignations, etc., occurred.[5a] Such a method of securing the benefits of the merger could not work a hardship on the merged railroad since its evidence showed that while 4,141 jobs were being abolished and transferred, 12,116 would be created by attrition. (R. 112.)

In support of its position, the Railway Labor Executives' Association relied upon the plain language of Section 5(2)(f), its legislative history and the interpretation placed upon Section 5(2)(f) by this Court during the course of its opinion in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950).

The hearing examiner recommended the approval of the merger and the rejection of the Association's position but he did not discuss that portion of this Court's opinion in *Railway Labor Executives' Association* v. *United States*, *supra*, relied upon by the Association. (R. 183.) The examiner recommended the imposition of the so-called "New Orleans conditions" which were evolved subsequent

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[5a] Throughout this brief this type of protection is referred to as "employment protection" as distinguished from "compensation protection" which provides monetary allowances in lieu of employment and which has been imposed heretofore by the Commission.

to this Court's decision in *Railway Labor Executives' Association* v. *United States, supra,* and provide partial financial compensation for affected employees. (R. 188.) The "New Orleans conditions", however, do not prevent the worsening of an employee's position with respect to his employment but, in fact, require such an effect to occur before they become operative. These conditions do not protect an employee from being deprived of employment by the abolishment of his job; they do not protect an employee from the loss of accumulated annuity rights under the Railroad Retirement Act in the event he is deprived of his employment; they do not protect an employee from continued moves which result from later job abolishments and transfers resulting from the merger; and, most important of all in the light of the continual shrinkage of its plant by the railroad industry, they do not protect him from being forever deprived of employment in the railroad industry, an industry in which he may have spent years developing skills which are not readily adaptable to work in other industries. (R. 50-51, 77.) One or more of the foregoing effects of the merger must take place before the "New Orleans conditions" become operative. (R. 50.)

The Association filed exceptions to the employee protection recommendation of the examiner and asked to be heard by the appellate division of the Commission to which merger cases are referred, Division 4. On the motion of the Erie and the DL&W and over the objection of the Association, the Division 4 proceeding was eliminated and the matter was referred directly to the full Commission which heard oral argument.

The full Commission affirmed the examiner's recommendations on September 13, 1960, but in doing so made no mention of those portions of this Court's decision in *Railway Labor Executives' Association* v. *United States, supra,* and *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company,* 362 U.S. 330, 80 S.

Ct. 761, 4 L. Ed. 2d 774, relied upon by appellants. (R. 10, 25-26.) The latter case was decided subsequent to the filing of the Association's brief to the examiner and was relied upon before the Commission as confirming by dictum this Court's interpretation of Section 5(2)(f) in the former case.

On October 7, 1960, ten days before the Commission's order was to become effective, the Brotherhood of Maintenance of Way Employes, a railway labor union the president of which is a member of the Association, instituted this action against the United States and the Interstate Commerce Commission by filing a complaint with the United States District Court for the Eastern District of Michigan. The complaint requested the issuance of a temporary restraining order pending a hearing on the merits by a statutory three-judge court. (R. 8-9.) The Erie and the DL&W intervened as party-defendants on October 10, 1960. (R. 36.)

After notice to all parties a hearing was held on October 12, 1960, before a single judge on the issuance of a temporary restraining order at which the Association intervened and all parties were given full opportunity to present evidence. (R. 39, 81-82.) The appellants informed the court that they were not interested in obstructing the merger of the railroads but merely wished to maintain the employment situation in status quo until the protective conditions required by Section 5(2)(f) could be imposed for the protection of employees. (R. 83.) The hearing consumed the entire day and the court issued a temporary restraining order on October 14, 1960, requiring the railroads to maintain the status quo regarding employment after they merged on October 17, 1960. (R. 160.)

A hearing on the merits was held on November 15, 1960, before three judges at which no additional evidence was received, however, argument was held on the issue of the interpretation of Section 5(2)(f). (R. 177.)

The District Court issued its decision on December 7, 1960, in which it called for the dismissal of the complaint and the dissolution of the temporary restraining order. Again no mention was made of those portions of the decisions of this Court in *Railway Labor Executives' Association* v. *United States, supra,* and *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company, supra,* relied upon by appellants. The court's decision also informed the parties that an order consistent with its decision might be presented. (R. 196, 202-203.)

On December 8, 1960, appellants filed a motion to maintain the status quo pending appeal to this Court. An argument was held on December 19, 1960, before the three judges of the District Court, at which no additional evidence was received and the court informed the parties that it would sign two orders, one dismissing the complaint and setting aside the temporary restraining order and another denying the motion to maintain the status quo pending appeal to this Court. These orders were signed and entered on December 19, 1960. (R. 204.) Notice of appeal was filed on January 9, 1961. (R. 205.)

SUMMARY OF ARGUMENT

I

The Commission conditioned its approval of the Erie-DL&W merger upon compliance by those railroads with the so-called "New Orleans conditions". These conditions provide financial compensation to employees who are deprived of their employment, placed in lower paying jobs or forced to transfer their homes as a result of the Commission's order of approval.

The New Orleans conditions do not protect an employee from the most serious effects of mergers such as the abolishment of his job and his loss of railroad employment; the loss of seniority rights; the loss of Railroad Retirement Act annuity rights; repeated transfers of

residence resulting from later job abolishments; and the loss of patiently and painstakingly acquired skills.

Congress intended no such hardships to be visited upon the railroad labor force of this courty as a result of its enactment of Section 5(2). The protection which Congress provided in that section requires those railroads which utilize its provisions to arrange their mergers so as to provide work for all employees comparable to that which they theretofore had performed, for at least a four year period following Commission approval.[8]

Congress provided that jobs could be abolished during this period but only through the process of natural attrition as deaths, retirement, resignations, etc. occur. Congress therefore protected employees from the loss of their valuable employment rights. There is no provision against the loss of those rights to be found in the conditions imposed by the Commission in this case.

Congress had expected immediate and extensive use to be made of Section 5(2) by the railroad industry since it had been indicated such a provision was vital to the industry's financial recovery. At the same time Congress knew the vast majority of savings accomplished through merger could be realized only at the expense of the railroad labor force and so it provided very specific protection for employees as a counter to the threat which it had presented to them.

For reasons best known to itself, the railroad industry did not utilize the provisions of Section 5(2) to merge railroads although it did use the statute to consolidate individual railroad facilities. For these minor purposes the application of financially compensatory conditions was adequate and was in fact suggested by the railroad

[8] The time limitations of Section 5(2)(f) also restrict the period of protection to the length of an employee's previous service if less than four years.

brotherhoods themselves. No mergers of any significance took place under the provisions of this Act until 1957 when the Louisville and Nashville Railroad Company and the Nashville, Chattanooga and St. Louis Railroad Company merged. At that time, however, there was no indication that the attitude of the railroad industry toward mergers had changed and that merger certainly presented no threat to the railroad labor force in the United States. Therefore, no objection was raised to the imposition of the "New Orleans conditions" in that case.

The picture has changed. Most of the major railroads in the United States are planning to merge with other railroads. The effect upon the railroad employment force will be extensive and severe. The railroad labor force is now confronted with the threat which Congress thought would materialize twenty years ago. The time has come therefore, for the employees to be afforded the protection intended by Congress to take effect when this threat arose.

It has taken twenty years for the railroad industry to utilize the tremendous economic weapon which Congress placed in its hands in 1940. Certainly the employees of that industry should not be prevented from utilizing at this time the shield which Congress provided against wielding of that weapon.

II

The first protection afforded employees from the effects of mergers and consolidations in the railroad industry is found in the Emergency Railroad Transportation Act of 1933, 48 Stat. 211. That law was enacted to save certain railroads from bankruptcy and to perpetuate an efficient means of rail transportation. *Louisville and N.R. Co.* v. *United States* (N.D. Ill., 1934), 10 F. Supp. 185, 191. That Act provided for the forced merger of the services and facilities of the railroads under the authority of a federal coordinator of rail transportation. It also provided that

regardless of what was done pursuant to its provisions no employee could be deprived thereby of employment or receive a lower wage. It is recognized that this Act created a "freeze" on employment.

One month before the 1933 Act was to expire, 85% of the railroads and 100% of the standard railroad unions executed an agreement which is known in the railroad industry as the Washington Agreement. This agreement departed from the employment protection concept established by the 1933 Act and provided financial compensation protection for all employees adversely affected as the result of mergers or consolidations.

In 1939 this Court held that the Commission had authority to impose employee protective conditions under the then applicable provision of the Interstate Commerce Act which contained no specific requirement of employee protection. *United States* v. *Lowden*, 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208 (1939).

The Transportation Act of 1940, which liberalized railroad merger requirements by requiring only that the Commission find proposed mergers to be "consistent with the public interest", returned to the employment protection concept established by the 1933 Act. Section 5(2)(f) required that for a period of four years subsequent to Commission approval of a merger employees could not be placed "in a worse position with respect to their employment".

In 1950 the Commission held that the "four-year" period referred to in subparagraph (f) was a maximum limitation upon its power. This Court held otherwise in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950). This Court held that the "four-year" period was the *minimum* limit of the Commission's power. No issue arose however regarding the *type* of protection required during the first four years following a merger.

III

The plain language of the second sentence of 5(2)(f) clearly provides that the protection afforded employees is not limited to compensation but must extend to the employment relationship itself. The term "employment" is not used as a term of art in Section 5(2)(f) and must be understood in its common, ordinary and usual sense. The term is defined as a "state of being employed". The statute forbids a worsening of an employee's position with respect to that state. Conditions which require a worsening of the state before they become operative do not satisfy the mandate of the statute.

The phrase "worse position with respect to employment" is an obvious melding of the two phrases found in the 1933 Act: "deprived of *employment*" and "*worse position with respect to* compensation for such employment".

Congress could have chosen the phrase "worse position with respect to compensation" and the use of that language would have left no doubt that only financial compensation protection was intended. Congress, however, very deliberately chose the phrase "worse position with respect to employment".

IV

The legislative history of Section 5(2)(f) virtually compels the conclusion that the second sentence of subparagraph (f) was intended for one purpose only—to preserve to each employee actively employed prior to the date of merger a continued active employment status substantially comparable to that which he held prior to the merger and at equivalent compensation; the protection to last for periods of up to four years following Commission approval of the merger, depending upon an individual employee's previous period of service.

The first sentence of Section 5(2)(f) was originally intended as the *sole* provision to be inserted in the Act for

the protection of employees adversely affected by transactions subject to Section 5(2). This provision was regarded as satisfactory by the majority of railroad labor and by all of railroad management, and was envisioned by them as statutory insurance of at least a continuance of the principles of the Washington Agreement. The first sentence of Section 5(2)(f) was recommended by the so-called Committee of Six, was passed by the Senate, and was reported favorably to the House by the House Interstate Commerce Committee. This sentence had a well-settled meaning, purpose and scope and was clearly regarded by the Congress as a provision under which the Commission could continue to exercise its discretion to grant protection along the lines of the Washington Agreement in much the same manner as it had theretofore been doing.

The original proposal of what is now the second sentence of Section 5(2)(f), the so-called Harrington Amendment, was designed, completely unlike the first sentence of the section, to insure that no employee *ever* would be deprived of employment or otherwise adversely affected with respect to his employment as a result of transactions approved under Section 5(2)(f) of the Act—in other words, the original Harrington Amendment would have required an indefinite "employment freeze". As a result, savings from job reductions would have to be realized through the process of natural attrition. As modified by the House and Senate conference committees this original objective was changed in one respect only—its operation was limited in time to a period of four years and, as limited, now appears in the second sentence of subparagraph (f).

At all times during the consideration of Section 5(2)(f) it was evident that the second sentence was designed and regarded as a provision, separate from the first sentence, guaranteeing, at first indefinitely and then for a period of four years, *continued employment* with economies to be realized only through natural attrition. Finally, the section

as a whole was carefully explained by members of the Conference Committee which drafted the measure as finally enacted, as one which guarantees a minimum four years' employment protection plus such further measures of protection as the Commission in its discretion might consider appropriate. Throughout the entire proceedings in the House involving the Harrington Amendment no one advanced the thought that it did not protect the employment of railroad employees. One and perhaps two of its opponents expressed the fear that its modified language on return to the second conference gave employees *more* protection than did its original language. They thought it might be interpreted as giving employees a choice between active employment or compensation for life if they decided not to remain employed. The author of the legislation used direct unequivocal language in stating that such a view was "completely erroneous."

V

When this Court issued its decision in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950), it had carefully reviewed the legislative history of Section 5(2)(f) and had a clear understanding of the effect, intent and meaning of the Harrington Amendment. In its opinion in that case this Court indicated its belief that the Harrington Amendment in its original form would have been unworkable since it threatened to prevent the consolidations to which it related. The Court recognized that the motion to recommit effected a "substantial change" in the Harrington Amendment but recognized that change as one which merely limited the operation of the Harrington Amendment to four years. It was this time limitation which, in the words of this Court, made the Harrington Amendment workable:

> "The second sentence thus gave a limited scope to the Harrington amendment and made it workable by putting a time limit upon its otherwise prohibitory effect."

Ten years later this Court issued its decision in *The Order of Railroad Telegraphers* v. *Chicago and North Western R. Co.*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774, which should have removed any possible doubts regarding this Court's view of the express requirements of the second sentence of 5(2)(f).

During the course of its opinion, which upheld the right of a rail labor union to bargain for stabilized employment under the Railway Labor Act, the Court referred to Section 5(2)(f) in the following terms:

> "It requires the Commission to do this by including 'terms and conditions' which provide for a term of years after a consolidation employees not be 'in a worse position with respect to their employment' than *they would otherwise have been.*" (362 U.S. at 337, emphasis supplied.)

Obviously, the italicized clause in the foregoing quotation could mean only that Section 5(2)(f) requires the *employment* status of railroad employees to be the same, or at least no worse, for the prescribed period subsequent to the merger than before. This construction of the Court's opinion is confirmed by reference to the dissenting opinion which disagrees with the interpretation of the majority and states that nothing in Section 5(2)(f) "authorizes the Commission to freeze existing jobs."

Both the Commission and the District Court refrained from commenting upon the particular portions of this Court's opinions quoted above. Counsel for appellees could only argue below that the precise holdings in those two cases were inapposite but made no attempt to discuss the statements relied upon by appellants. We can only conclude from such reluctance to discuss these statements an inability to view them other than as interpreting Section 5(2)(f) as granting employment protection for the four year period following Commission approval of a merger.

VI

The Interstate Commerce Commission attempts to support its decision that Section 5(2)(f) requires only compensation protection by citing cases which were decided long ago and well before the issue presented to this Court was raised by anyone. The Commission also relied upon the "contemporaneous construction" doctrine. This Court rejected the Commission's reliance on that doctrine in its 1950 decision interpreting Section 5(2)(f) when it stated (339 U.S. at 154):

> "The Commission's interpretation of this statute, although entitled to weight, is not persuasive."

A similar conclusion is applicable here particularly since the issue before this Court has never been decided by the Commission.

The Commission placed great reliance upon two short and informal colloquies which took place on the floor of the House. These colloquies, however, are so vague as to be susceptible of citation in support of the appellants' position, as well as that of the appellees.

The District Court relied upon certain articles from 1940 issues of railway union magazines which had not been placed in evidence with the court. Aside from the fact that reliance upon such material is contrary to decisions of this Court, *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884, the articles relied upon were taken from the magazines of a small minority of the railroad brotherhoods, and at that, brotherhoods which had *opposed* the Harrington Amendment because they felt insistence upon its enactment would have killed the entire provision relating to mergers.

The District Court dismissed the clear and extensive legislative history of Section 5(2)(f) with the statement that the original language of the Harrington Amendment was not adopted into law and that the "Congress knew what the Harrington Amendment sought to accomplish and

refused to include that language or its *equivalent.*" (Emphasis supplied.)

The Court finally concluded that the term "worse position with respect to employment" did not refer to "employment" at all but made no finding as to what it otherwise possibly could have been intended to mean; yet it held that there was no "ambiguity within the structure of Section 5(2)(f)."

Both tribunals failed to come to grips with the most convincing factors supporting employment protection—the opinions of this Court in the *RLEA* and *ORT* cases, *supra;* the clear, unequivocal and unchallenged statements of the author of the provision, Rep. Harrington; and the statements of all those who spoke in support of the provision.

VII

The District Court erred in refusing to receive the testimony of Mr. H. C. Crotty, president of the Brotherhood of Maintenance of Way Employes[7] and a member of RLEA, at the hearing on the merits and compounded that error by considering matters outside the record.

The Crotty testimony explained in detail the effect of the merger upon employees. As such it was a mere amplification of the record before the Commission and should have been admitted and considered. *United States* v. *State of Idaho,* 298 U.S. 105, 109, 56 S. Ct. 69, 80 L. Ed. 1070; *Baltimore & Ohio Railroad Company* v. *United States,* 298 U.S. 349, 353-354, 372, 56 S. Ct. 797, 80 L. Ed. 1209.

The rule is particularly applicable here because the District Court relied upon six excerpts from various union journals in reaching its decision which had been referred to in appellees' brief and on oral argument but had not been offered or received in evidence either in the District Court or before the Interstate Commerce Commission.

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[7] Herein called the Brotherhood.

ARGUMENT

The record developed at the hearing before the examiner contained undisputed evidence that approval of the merger would cause extensive employee adverse effect through job abolishments and job transfers (R. 112) and the proceeding admittedly is subject to the provisions of Section 5(2)(f). Therefore, there were present before the Commission and are now present before this Court all elements necessary to require compliance with the mandate contained in the second sentence of Section 5(2)(f).

The Commission, the Erie-Lackawanna and the appellants were and are in agreement that the "New Orleans conditions" provide only financial compensation as a means of partially alleviating the hardships visited upon employees as a result of a merger. The Commission also was well aware of the practical effect of the application of the "New Orleans conditions". In view of these circumstances, there was no need to present to the Commission evidence additional to that which already had been placed in the record by the railroads. Nor was there any *need* for the introduction of additional evidence before the District Court. The discussion of the detailed effects of this merger upon the employees of the former Erie and DL&W railroads which is contained in this brief is based upon the testimony before the three-judge court of Mr. H. C. Crotty, president of the Brotherhood and a member of the Association, and the exhibits introduced through him. This evidence was adduced to acquaint the District Court with the serious problems confronting railroad employees upon mergers, the effects of mergers upon employees, and the practical effect of the application of the "New Orleans conditions" to employees who have been placed in a worse position with respect to their employment as the result of a merger. Appellants do not believe a discussion of such detailed effects upon employees is necessary for a proper determination of the primary legal issue before this Court[*]—the interpre-

[*] For this reason, the detailed effects of the merger on employees is not set forth in the appellants' STATEMENT, *supra*.

tation of Section 5(2)(f), but it is useful in affording a comparison between the effects of "employment" protection and "compensation" protection. In addition, the evidence upon which the discussion is based supports appellants' request for a permanent injunction pending Commission compliance with the statute.

I

SUMMARY OF APPELLANTS' POSITION

The Interstate Commerce Commission conditioned its approval of the Erie-Lackawanna merger upon compliance by that railroad with the provisions of the so-called "New Orleans conditions". (R. 26.) These "conditions" require monetary payments to be made to employees whose employment status with the Erie-Lackawanna has been worsened as a result of the merger by dismissal, displacement or transfer. (R. 50, 139-159.)

The "conditions" provide that employees who are deprived of employment as a result of the merger are to receive financial compensation in lieu of employment; employees who are placed in lower paying jobs are to be provided compensation equalling the difference between their former and their present wages; employees required to move as a result of the merger are to be compensated for their moving expenses. The "conditions" are automatically inoperative until *after* the occurrence of such effects. It is only then that the "conditions" provide financial compensation to alleviate partially the effects of an employee's having been placed in a worsened employment status. (R. 50, 139-159.)

When it is free to do so the merged railroad will abolish certain jobs and transfer other jobs. The employees directly affected then must exercise their seniority rights to secure other positions with the railroad. Such rights

arise from collective bargaining agreements* executed by the railroads and the representatives of their employees and are evidenced by "seniority rosters" which set forth the names of the employees in order of seniority together with the date upon which their seniority rights are based. Each employee has seniority rights superior to employees listed below him on the roster and inferior to those listed above him. The seniority rights of an employee may be exercised only against other employees whose names appear on the same seniority roster on which his name appears. The seniority roster contains the names of all employees in a particular class or craft in a seniority district which is usually geographically co-extensive with a railroad division and may cover several hundred miles. (R. 44.)

When an employee is directly affected by the abolishment or transfer of his job, he goes immediately to the seniority roster and determines the employee who is junior to him whom he can displace or "bump". (R. 44.) Under the terms of the so-called "New Orleans conditions", the employee *must* exercise his seniority rights in order to obtain the financial compensation provided in those "conditions". (R. 50.) The exercise of these rights may involve the displacement of a junior employee one hundred miles away. (R. 44.) The "New Orleans conditions" would require the railroad to pay the employee's moving expenses to his new job and if that job paid less than his former job the railroad would be required to make up the difference. (R. 155-156, 157-158.) The employee who was displaced or "bumped" would also be required to exercise his seniority rights and perhaps move one

* The collective bargaining agreements which appellant Brotherhood maintains with the Erie and the DL&W were introduced into evidence at the hearing before Judge Thornton as Exhibits Nos. 3, 4, 5 and 6. Mr. Crotty testified that the collective bargaining agreements maintained with the Erie and the DL&W by the unions whose chief executive officers are members of the Association "are identical in principle" to the Brotherhood's agreements insofar as seniority rights are concerned. (R. 60.)

hundred miles to a new location where he would "bump" another employee who might be required, through the exercise of his seniority rights, to "bump" still another employee and this process would continue until it reached the man at the bottom of the seniority roster who would be deprived of employment. (R. 50-51, 77.) This man would receive a "dismissal allowance" which would be decreased in amount by any other income he received subsequent to his dismissal. (R. 156-157.)

Should the railroad abolish another job which directly affected the employee immediately senior to the first man mentioned above, the process would begin all over again and none of the employees who previously had been required to move would receive moving expenses. (R. 50.) Nor would they have any guarantee that they would not be required to move a third, fourth or fifth time as the result of additional job abolishments by the railroad company. For each employee whose job is directly abolished or transferred, two, ten or perhaps twenty employees may be adversely affected in their employment and those employees do not receive even moving expenses if they have been required to move previously. (R. 50.)

The hardship created by the abolishment and transfer of approximately 4000 jobs, therefore, is not limited to the 4000 employees occupying those jobs but is extended to every employee of the railroad whose seniority rights are inferior to those of the employees directly affected and who, because of that fact, must uproot his family and move to a new community with no guarantee that a week or a month later he will not be compelled to move again. The "New Orleans conditions" contain no protection whatever against this serious hardship. (R. 47.)

Furthermore, the "New Orleans conditions" do not protect an employee from having his job abolished and his active employment with the railroad terminated; they do not protect an employee from a loss of accumulated annuity

rights under the Railroad Retirement Act in the event he is deprived of employment; and they do not protect him from being forever deprived of employment in the railroad industry, an industry in which he may have spent years developing skills which are not readily adaptable to work in other industries. (R, 50-51, 77.)

It is the position of the appellants that in enacting Section 5(2)(f) of the Interstate Commerce Act, Congress intended to prevent the wholesale dumping of thousands of unemployed railroad men onto the labor market and to protect the valuable rights accrued and the skills developed over the years by employees in the railroad industry which could be seriously affected or lost altogether as a result of the enactment of Section 5(2). The protection which Congress provided in enacting subparagraph (f) requires railroads which utilize the privileges conferred by Section 5(2) to work out their merger arrangements so as to provide for all employees work comparable to that which they had performed prior to the merger. However, Congress did not intend to required merged railroads necessarily to continue in effect the same *number* of jobs which existed prior to merger. Congress knew that jobs would be abolished and did not prevent such a result. However, it provided that for a period of at least four years after Commission approval, jobs could be abolished only through the process of natural attrition, i.e., as retirements, deaths, discharges, resignations, etc., occurred. As a result of this legislation mergers could be effected and jobs abolished but gradually and without the demoralization of the labor force which would surely result if jobs could be abolished at will.

Congress also was aware that in enacting Section 5(2) it was providing the railroads of the United States with a tremendous economic weapon. This law liberalized the then existing merger provisions of that Act and thereby alleviated a serious financial problem facing the railroads by permitting them to eliminate competition and reduce ex-

penses. Congress, however, in granting this right of easy merger to the railroad industry also placed upon it a concurrent responsibility. While it granted the railroads a means of reducing competition within the industry, it also imposed upon it the responsibility of seeing to it that for a period of four years from the effective date of orders approving mergers there would be no wholesale abolishment of jobs and dumping of railroad employees onto the open labor market. The Congress assured the industry's execution of this responsibility by requiring the Interstate Commerce Commission to include in each of its orders approving a merger "terms and conditions" which provide that for a period of four years from the date of such order the merger will not result in the railroad employees involved being placed "in a worse position with respect to their employment *than they would otherwise have been.*" *The Order of Railroad Telegraphers, et al.* v. *Chicago and North Western R. Co.*, 362 U.S. 330, 337, 80 S. Ct. 761, 4 L. Ed. 2d 774, (1960).

The "terms and conditions" required by Section 5(2)(f) permit a merged railroad to transfer work from one point to another but require the railroad to allow its employees to follow that work. If fewer employees are needed by the merged railroad than were needed by its predecessor railroads, the surplus will be absorbed and swiftly eliminated by natural attrition.[10] To this limited extent, the full benefits of the merger may be partially and temporarily postponed.[11]

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[10] In the present case, the Erie and the DL&W informed the Commission that it intended to abolish 403 jobs during the first year following approval of the merger but during the same period 2507 jobs would be created by attrition, and during the first five years following the merger 1982 jobs would be abolished while 12,116 jobs would be created by attrition. (R. 112.)

[11] This is also a recognized effect of the discretionary imposition of compensation protection under Section 1(18) of the Act but has been rejected by the Commission as a reason for refusing to provide such protection. *Pac. Elec. Ry. Co. Abandonment, Etc.*, 275 I.C.C. 649, 676 (1952).

The "terms and conditions" intended by Congress to be imposed in merger cases would not deprive employees of the railroads of any of the rights which they have acquired over the years. Furthermore, the railroad industry would be able to accomplish all its desired objectives through merger and the public would reap the benefits of an industry with a high level of employee skill and morale.

II

HISTORY OF EMPLOYEE PROTECTION IN THE RAILROAD INDUSTRY

The first example of direct and specific provision for the protection of railroad employees is found in the Emergency Railroad Transportation Act of 1933, Act of June 16, 1933, Ch. 91, Sections 1-17 and 209, 48 Stat. 211. This law was enacted in a time of great financial peril for the railroad industry. It was passed to save certain railroads from bankruptcy and to perpetuate an efficient means of railroad transportation in the United States. *Louisville and N. R. Co.* v. *United States* (N.D. Ill., 1934), 10 F. Supp. 185, 191. In the words of the district court in the *Louisville and N. R. Co.* case, the 1933 Act evidenced "the announced policy of the Government to render assistance to all carriers and keep their heads above water until calmer times appeared." 10 F. Supp. at 192.

Certain provisions of the 1933 Act amended the merger provisions of the Transportation Act of 1920, 41 Stat. 480. Other provisions of the 1933 Act provided for the appointment of a federal coordinator of railroad transportation who was charged with the duty of encouraging, promoting or requiring action on the part of railroads, which would avoid unnecessary duplication of services and facilities, and promote financial reorganization. There was also provision for the immediate study of other means of improving conditions surrounding railroad transportation. [1933 Act, Section 4, 48 Stat. 212.] All action taken to carry out the pur-

pose of the 1933 Act was governed by Section 7(b) which provided as follows:

> "The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the pay rolls after the effective date of this Act by reason of death, normal retirements, or resignations, but not more in any one year than 5 percentum of said number in service during May, 1933; *nor shall any employee in such service be deprived of employment* such as he had during said month of May *or be in a worse position with respect to his compensation for such employment*, by reason of any action taken pursuant to the authority conferred by this title." (Emphasis supplied)[12]

It is of striking significance to our inquiry here that by enacting this provision Congress obviously felt the railroads could be saved from bankruptcy and an *efficient* means of railroad transportation perpetuated while preserving the employment of all actively employed railroad workers and that an attrition rate limited to five percent per year of total employment would permit the accomplishment of these objectives of the Act. The Erie-Lackawanna attrition rate is twice as great as that which Congress permitted to take place under the provisions of the 1933 Act. (R. 53, 112.) Congress, therefore, did not believe

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[12] 48 Stat. 213. Paragraph (d) of Section 7 directed the Federal Coordinator of Railroads to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when it had been transferred:

Section 7(d). "The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title."

that employment protection violated the National Transportation Policy.

The italicized words quoted above emphasize Congressional awareness of the difference between an employee being placed "in a worse position with respect to his compensation" and an employee being placed "in a worse position with respect to his employment". Both "deprived of employment" and "no worse position with respect to compensation" were necessary to provide employment protection in the 1933 Act—if the latter clause had been eliminated there would have been no obligation to maintain the previous level of pay; if the former clause had been eliminated the pay would have remained the same but there would have been no obligation to retain the men in service.

Section 7(b) of the 1933 Act clearly provided that in mergers or other matters to which it applied, an employee must be given a job at least equivalent to his former position and compensation equal to that which he formerly received; in other words, he must be placed in no "worse position with respect to his employment".

Section 17 of the 1933 Act provided that the provisions relating to the federal coordinator should expire on June 16, 1934, unless extended by proclamation of the President. The Act was extended to June 17, 1936, on which date it expired.

One month before the 1933 Act was to expire, an agreement was executed in Washington, D. C., by 85% of the major railroads in the United States and all of the standard railroad labor unions. This agreement was entitled "Agreement of May, 1936, Washington, D. C." and is commonly referred to in the railroad industry as the "Washington Agreement." (R. 139.) The purpose of the agreement was to provide partial financial protection to employees who were deprived of their employment or otherwise ad-

versely affected in their employment as a result of a "coordination".[13]

The expiration of the 1933 Act did not affect the merger provisions of the Transportation Act of 1920. Section 5(4) of the Interstate Commerce Act permitted approval of a merger upon findings by the Commission that such merger would "be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and will promote the public interest." [14] The Commission had the power to approve a merger "upon the terms and conditions and with the modifications so found to be just and reasonable." [15]

In 1939, this Court unanimously reversed a district court decision and affirmed the Commission's power to impose employee protective conditions as "just and reasonable conditions" in the public interest. *United States* v. *Lowden*, 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208 (1939). In its decision, the Court said (308 U. S. at 233, 234):

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[13] A "coordination" is defined in Section 2(a) of the Agreement as "joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such facilities."

[14] Act of February 28, 1920, Ch. 91, 41 Stat. 480, 482; Act of June 16, 1933, Ch. 91, Title II, 48 Stat. 217-220.

[15] *Ibid.* It is to be noted that Section 5(2) permits the Commission to approve mergers if it finds them to be "*consistent* with the public interest" whereas the merger provisions of the 1920 Act as amended by the 1933 Act required the Commission to find that such mergers would *promote* the public interest and not merely be consistent with that interest. In addition, the Commission had to find that the merger would be in furtherance of the plan for the consolidation of railway properties which had been established by the Commission in accordance with Section 5(3) of the Interstate Commerce Act as it had been amended by the 1933 Act. Section 5(3) provided for the adoption by the Commission of a plan for the consolidation of the railway properties "of the continental United States into a limited number of systems."

"It is thus apparent that the steps involved in carrying out the congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute."

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"One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system."

The Transportation Act of 1940, 54 Stat. 899, effected a considerable liberalization of the merger requirements of the Interstate Commerce Act. No longer would railroads seeking authority to merge be required to prove that their merger would be "in harmony with and in furtherance of" a national plan for railroad consolidation established by the Commission or that it would "promote" the public interest. The railroads now need only prove that their merger would be "consistent" with the public interest.

A detailed review of the legislative history of subparagraph (f) of Section 5(2) will be presented in a later section of this brief. Suffice it to say for the present that Congress quite naturally expected immediate and extensive utilization of the liberalized merger provisions[16] as the

[16] See *County of Marin* v. *United States*, 356 U.S. 412, 78 S.Ct. 880, 2 L.Ed. 2d 879 (1958) in which this Court said (356 U.S. at 416-417): "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system."

railroad industry had indicated such provisions were vital to its financial recovery. At the same time Congress was thoroughly familiar with the serious and extensive adverse effect which the utilization of Section 5(2) would have on railroad employees. Therefore, in enacting those provisions, Congress added a subparagraph (f) which required mandatory protection for railroad employees substantially the same as that which it had provided for such employees in the 1933 Act. Specifically, Congress provided that employees could not be placed "in a worse position with respect to their employment" as a result of the utilization of the liberalized merger provisions, and for a period of four years thereafter.

In 1950 a question arose as to whether the four-year period contained in the second sentence of Section 5(2)(f) should be regarded as a maximum limitation upon the power of the Commission to impose conditions or a minimum limitation upon that power. This question arose as a result of the Commission's approval of an application under Section 5(2)(f) to consolidate passenger terminal facilities at New Orleans, Louisiana, by the construction of a terminal to be called the New Orleans Union Passenger Terminal. The Commission regarded the four-year period as a maximum limitation upon its power and it, therefore, limited the period of protection granted in that case to four years from the date of its order approving construction of the terminal. That limitation would have meant the complete loss of protection to employees affected by the construction of the terminal since the construction could not be completed within four years from the date of the Commission order and the employees would not be affected until the terminal had been completed. *New Orleans Union Passenger Terminal Case*, 267 I.C.C. 763.

The matter was pursued before the United States District Court for the District of Columbia which upheld the Commission and was then appealed to this Court, which reversed the District Court and the Commission. *Railway*

Labor Executives' Association v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950). This Court reviewed the legislative history of Section 5(2)(f) and concluded as follows (339 U.S. at 155):

> "We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation."

The issue before the Court in the last cited case involved the provisions of Section 5(2)(f) only insofar as they applied to employees affected *after* the expiration of four years from the date on which the Commission had entered its order. The primary issue now presented to this Court, and which was presented below, is the protection required to be afforded employees *within* the period of four years subsequent to the Commission's order.

We will now discuss that issue from the standpoint of the plain language of Section 5(2)(f), its legislative history, and its interpretation by this Court.

III

THE PLAIN LANGUAGE OF THE STATUTE CLEARLY REQUIRES PROTECTION OF AN EMPLOYEE'S STATUS WITH RESPECT TO HIS EMPLOYMENT

For the convenience of the Court in following the argument to be advanced in this section, we repeat the language of the first and second sentences of Section 5(2)(f):

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrange-

> ment to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

On its face the first sentence of the section plainly vests in the Commission the discretion to determine what will constitute fair and equitable protection for employees. This provision makes mandatory a fair and equitable arrangement for the protection of employee interests, but leaves within the Commission's discretion the determination of the nature and scope of the particular type of protection to be afforded.

The second sentence of Section 5(2)(f), however, provides a specific type of protection which is not left to the Commission's discretion but which is spelled out in the provision and which *must* be imposed in all cases *as a minimum* protection. This specific protection is limited in time to four years from the effective date of the Commission's order approving a transaction under Section 5(2). The protection is referred to only as "employment" protection.

There is nothing in subparagraph (f) or Section 5 or the entire Interstate Commerce Act which would indicate that the term "employment" was inserted by Congress in subparagraph (f) as a special term of art and should therefore be understood in any sense other than that which is ordinarily and usually attributed to it. See *Caminetti* v. *United States*, 242 U. S. 470, 485-486, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

This court has reiterated on innumerable occasions the fundamental rule of statutory construction that the "nat-

ural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant." *United States* v. *First National Bank*, 234 U. S. 245, 258, 34 S. Ct. 846, 58 L. Ed. 1298. See also *Western Union Teleg. Co.* v. *Lenroot*, 323 U. S. 490, 65 S. Ct. 568, 76 L. Ed. 1128; *Southern R. Co.* v. *United States*, 222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Columbia Water Power Co.* v. *Columbia Elec. Street R. L. & P. Co.*, 172 U. S. 475, 19 S. Ct. 247, 43 L. Ed. 521. The "natural and usual signification" of the term "employment" is the "state of being employed." Webster's New Collegiate Dictionary, 2nd Ed. The first sentence grants compensation protection based upon the provisions of the Washington Agreement and that is the only protection that has ever been afforded employees under Section 5(2)(f) by the Commission. Therefore, the second sentence becomes meaningless if it does not provide employment protection.

The employment relationship, of course, constitutes the total relationship between the employer and the employee and consists of many benefits which cannot be measured in terms of financial compensation equal to an employee's wages.

Since Section 5(2)(f) states that an employee shall not be placed "in a worse position with respect to his employment", conditions which provide only financial compensation equal to wages previously received, as provided by the "New Orleans conditions" imposed in this case, do not satisfy the requirements of Section 5(2)(f) as they permit, indeed require, the worsening of the employee's position with respect to his employment, his state of being employed, before they become operative. In order to satisfy the mandate of subparagraph (f), conditions must be imposed which prohibit the worsening of an employee's position with respect to his employment.

The second sentence of this section is now well recognized as providing the minimum protection afforded by Con-

gress. The first sentence of the section permits the Interstate Commerce Commission to *go beyond* that minimum protection if it feels that additional protection is required in order to afford the employees a "fair and equitable arrangement to protect" their interests.

If we desire to buttress the clearly apparent meaning of the term "worse position with respect to their employment", we need only to refer to the language used by Congress in providing employment protection in the Emergency Railroad Transportation Act of 1933.[17] A comparison of Section 5(2)(f) with Section 7(b) discloses that Congress merely combined the terms "deprived of employment" and "worse position with respect to compensation from such employment" into one term—"worse position with respect to employment"—and placed it in Section 5(2)(f). Neither of the terms referred to in Section 7(b) standing alone adequately would protect employees with respect to their employment. If Section 7(b) contained merely the first term and not the second employees might be kept on but could be given menial jobs at far lower rates of pay. If the second term stood alone in Section 7(b) the railroads affected thereby would have no obligation to continue a particular employee in active employment, although required to continue paying his wages. The same effects would have occurred under Section 5(2)(f) had Congress incorporated either of the two terms in that provision without incorporating the other. Congress, however, combined the two terms and in doing so provided adequate employment protection.

It seems obvious that an employee is not maintained in no "worse position with respect to employment" if he

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[17] Sec. 7(b) of the 1933 Act provided "• • • nor shall any employee in such service be deprived of employment • • • or be in a worse position with respect to his compensation for such employment • • •."

is discharged, or if he is kept on but placed in a lower paying job.[18]

We respectfully submit that "worse position with respect to employment" means precisely what it so plainly says and we further submit that there is no other way in which Section 5(2)(f) reasonably can be construed. Moreover, this is the only construction consistent with the legislative history of Section 5(2)(f) and the decisions of this Court in *Railway Labor Executives' Association* v. *United States*, 339 U. S. 142, 151-154, 70 S. Ct. 530, 94 L. Ed. 721 (1950) and *The Order of Railroad Telegraphers* v. *Chicago and N. W. Ry. Co.*, 362 U. S. 330, 355, 80 S. Ct. 781, 4 L. Ed. 2d 774 (1960).

It is also a fundamental rule of statutory interpretation that resort to legislative history may not be had where the language used is clear or if done to construe a statute contrary to its plain terms. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 56 S. Ct. 70, 80 L. ed. 62; *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 199, 33 S. Ct. 893, 57 L. Ed. 1446. This Court has also held

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[18] In their joint brief to the District Court the United States and the I.C.C. suggested that the use of the novel term "*in* their employment" would more readily have been used by Congress than the familiar term "worse position with respect to their employment" had Congress intended to provide employment protection in Section 5(2)(f). It seems extremely unreasonable to suppose that Congress would have resorted to the novel term suggested by the appellees when it had available to it in both the 1933 Act and the Washington Agreement the more familiar "worse position with respect to." Certainly, had Congress intended only compensation protection it easily could have substituted the word "compensation" for "employment" and merged railroads would have been free to furlough and discharge their employees at will so long as they kept them whole financially. It was also argued that the term "worse position with respect to compensation" is a term of art because of its use in the 1933 Act and the Washington Agreement and implies that an employee will be retained in active service. If that term used in conjunction with "compensation" implies continued employment then *a fortiori* its use in conjunction with "employment" compels such a conclusion.

that it is not at liberty to construe language so plain as to need no construction. *Helvering* v. *City Bank, Etc., supra,* 296 U. S. at 89. In view of these rules and the unmistakable clarity of the phrase "no worse position with respect to their employment" as used in subparagraph (f), it is respectfully submitted that no resort to legislative history need, or should, be had in this case. However, if, notwithstanding these applicable rules of statutory construction, the Court believes it should resort to the legislative history of Section 5(2)(f) there will be found a clarity of congressional intent almost unique in character. The legislative history of Section 5(2)(f) leaves no doubt as to Congress' intent when it very deliberately used the phrase "worse position with respect to their employment" in the second sentence of that provision.

IV

LEGISLATIVE HISTORY COMPELS THE CONCLUSION THAT EMPLOYEES MUST NOT BE ADVERSELY AFFECTED IN THEIR EMPLOYMENT FOR FOUR YEARS

The history of Section 5(2)(f) was exceedingly protracted in the light of the brief section which finally emerged. The true intent of the language which resulted can be readily understood against the backdrop of the intense struggle which characterized its passage—a struggle in which two forces of railway labor, with entirely different aims and objectives, finally saw their separate objectives each enacted into law.

Any confusion or misunderstanding which possibly might exist concerning the nature of the mandate contained in the second sentence is quickly dispelled by examination of this legislative history.

A. Background of the Legislation

The situation which gave rise to the Transportation Act of 1940 was briefly this. The financial condition of the railroads had evoked considerable concern over a period begin-

ning about 1929 and by 1940 about 1/3 of the railroad mileage in the country was in the hands of receivers and trustees.[19] On September 20, 1938, the President appointed a special committee known as the "Committee of Six", the membership of which was equally divided between management and labor,[20] and directed them "to consider the transportation problem and recommend legislation."[21] It was their recommendation with respect to proposed changes in the merger and consolidation sections of the Interstate Commerce Act that there be made compulsory "a fair and equitable arrangement to protect the interest of the . . . employee".[22]

As far as the general question of mergers and consolidations was concerned, there was at that time no controversy either in or outside the Committee of Six. The Interstate Commerce Commission had flatly stated that the elimination of the provisions in the Transportation Act of 1920 requiring the Commission to direct the consolidation of railroads into a pre-arranged limited number of systems was one of the primary purposes in amending that

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[19] H.R. Doc. No. 583, 75th Cong., 3rd Sess., pp. 33, 48.

[20] The Committee of Six was composed of Mr. M. W. Clement, President, Pennsylvania Railroad; Mr. E. E. Norris, President, Southern Railway; Mr. C. R. Gray, Vice Chairman, Union Pacific Railroad; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks and Chairman of the Railway Labor Executives' Association; Mr. B. M. Jewell, President of the Railway Employes' Department of the American Federation of Labor; and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen. (Hearings on Transportation Act of 1939, Senate, pp. 4-5).

[21] Report of the Committee to the President, dated December 23, 1938, p. 1. The Report is reprinted on pp. 257-308 of Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H.R. 2531 and H.R. 4862, hereinafter referred to as "House Hearings".

[22] House Hearings, p. 275.

Act.[23] This plan had proved a failure and it was the consensus of opinion in the Committee of Six that it should be abandoned.

It was conceded, however, on all sides that economies could be brought about through consolidations and mergers of rail carriers voluntarily proposed. It was further conceded that these economies would be realized principally at the expense of railroad labor. At first glance, this would appear to present one of those controversial questions of labor relations which the Committee of Six desired to avoid. Such, however, was not the case because the potential conflict of interests between the parties had already been adjusted through the execution of the Washington Agreement in May 1936. (R. 139.)

Accordingly, there was no controversy between the members of the Committee of Six as to the question of the protection of employees in consolidation cases, and the Committee could recommend, as it did, that in passing upon a carrier's application for leave to effect a consolidation, the tribunal having jurisdiction "shall examine into probable results of the proposed consolidation and require as a prerequisite to its approval a fair and equitable arrangement to protect the interest of the . . . employee."[24]

It must be remembered that when the Committee made this recommendation, it merely advocated doing what the employee organizations and most of the railroads had already done through their execution of the Washington Agreement. That the above is an accurate appraisal of the reasons which actuated the Committee is revealed in the testimony of Mr. Harrison when he stated as follows:

> "Now, the existing situation is this: In 1936 in the Spring of that year, we made an agreement with about 85 per cent of the mileage of the country providing a schedule of benefits for workers that might be affected

[23] Id. at p. 31.

[24] House Hearings, p. 275.

by consolidations or mergers. That agreement has now been in operation for about three years and it has worked out very satisfactorily. It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made." [25]

B. Senate Proceedings

Pursuant to the recommendations of the Committee of Six, Senators Wheeler and Truman, on March 30, 1939, introduced a bill, S. 2009, concerning which Senator Wheeler stated:

"We did take the recommendations of the Committee of Six, and we used them as a basis for much that is contained in the pending bill, . . ." [26]

Section 49 of the bill dealt with the subject of mergers, unifications, consolidations, etc., and provided that, among other things (Sec. 49(3)(c)):

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." [27]

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[25] Id. at pp. 216-217.

[26] 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6136.

[27] This language is almost identical with the recommendation of the Committee of Six, *supra*.

Hearings were commenced before the Senate Committee on Interstate and Foreign Commerce on April 3, 1939, and on that day Mr. Harrison testified. He stated that if it became necessary or desirable to have unifications or consolidations with resulting displacement of men a reasonable adjustment such as labor then had with management [28] would "in the main" protect labor. His *testimony is of importance to the issue now before this Court because it demonstrates that the statutory proposal of the Committee of Six for the protection of labor, which is now the first sentence of Section 5(2)(f), was intended to preserve the Commission's discretion to apply the principles of the Washington Agreement.*

Mr. Harrison said:

> "Now, we realize that to the extent that there are unifications made and the extent that they can be shown to be in the public interest, railroad labor will be adversely affected so we say that the Interstate Commerce Commission shall have the authority and that is in the report to provide for reasonable provisions for the protection of labor. The Commission now has that authority, but it is disputed by the railroads. The Committee of Six agrees that labor shall be protected in those measures authorized by the Commission.
>
> "In the report of the Committee of Six we do not undertake to lay down the specific, detailed protection that should be accorded labor by the Commission, but we were very much of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the employees' labor unions. It provides a schedule of benefits and protections.
>
> "So to that extent I think the interest of labor will be protected, the public interest will be protected, and

[28] The adjustment referred to was the Washington Agreement.

> the opportunity to eliminate some bad situations in the railroad transportation machine will be available."[29]

The hearings before the Senate Committee were concluded on April 14, 1939. On May 16, 1939, the Committee submitted its report to the Senate explaining therein the changes made and the unification and consolidation provisions of the bill. The report states that among the important changes accomplished by Section 49 of the bill was a provision:

> "that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of Section 49, a fair and equitable arrangement to protect the interests of the employees affected.
>
> "The provisions referred to immediately above were included pursuant to the recommendations of the report of the Committee of Six (p. 30). There are no similar provisions in existing law."[30]

The bill was debated on the floor of the Senate from May 22nd to May 25, 1939, when it passed by a vote of 70-6.[31] Section 49(3)(c) of the bill was left unaltered and now constitutes the first sentence of Section 5(2)(f) of the Interstate Commerce Act.

C. House Proceedings

In March 1939, Chairman Lea of the House Committee on Interstate Commerce introduced a bill (H.R. 4862) which was similar to S. 2009 with respect to the merger provisions. The House hearings on the bill were conducted from January 24, 1939, to March 30, 1939. At these hearings Mr. Gray, one of the management members of the Committee

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[29] Hearings before the Committee of Interstate Commerce, U. S. Senate, 76th Cong., 1st sess., on S. 1310, S. 2016, S. 1869, and S. 2009, p. 34, hereafter referred to as "Senate Hearings".

[30] Sen. Rep. No. 433, 76th Cong., 1st Sess., pp. 28-29.

[31] 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6158.

of Six, said there was no disagreement whatever about protecting employees affected by consolidations and mergers, and that they had "a basis for *compensation* for men who are displaced and men who are disadvantaged by a consolidation or coordination." [32] (Emphasis supplied.)

Mr. Harrison told the House Committee of the provisions of the Washington Agreement, then in force three years, and which "has worked out very satisfactorily" [33] and added: "It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principles that the men are entitled to protection." [34]

In short, the testimony of Mr. Gray and Mr. Harrison means that the carriers and labor had in good faith entered into the Washington Agreement, which extended compensation protection to displaced and dismissed employees for a period of five years from the date that the adverse effects occurred. This agreement had been applied in substance by the Commission in the case which ultimately received this Court's approval, *United States* v. *Lowden*, 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208, and it was the sense of the Committee of Six that the proposed employee provision would insure compensation protection for labor by making mandatory a fair and equitable arrangement by the Commission but leaving as discretionary the exact nature of the protection to be afforded. By incorporating this language into the statute, Congress adopted the attitude of the Committee, i.e., that here was a non-controversial matter germane to the purposes of the statute which should be included without further debate.

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[32] House Hearings, pp. 184, 193-194.

[33] *Id.* at p. 260.

[34] *Ibid.*

On July 18, 1939, the House Committee reported its own bill by striking everything in S. 2009 after the enacting clause. Instead of codifying the Act, as had the Senate bill, the House bill amended certain existing provisions of law and added a part III dealing with water carriers. With respect to the employee provision of the merger section, the House adopted the identical language of the Senate bill.[35]

The bill thus reported was debated in the House beginning July 21, 1939.

At this point, therefore, we find most of railway labor and all of railway management in agreement on the type of provision which should be inserted into the law for the protection of the interests of the employees affected by mergers or consolidations. At this time, also, there was concurrence in this view by the United States Senate and by the House Committee which had considered the subject. The record clearly indicates that the only protection which was envisioned at this point was protection similar to that afforded by the provisions of the Washington Agreement—protection limited to *financial compensation* only.

Three days after the beginning of debate on the House Committee bill there was injected a concept of employee protection not theretofore considered by either the House or the Senate in hearing or debate—the concept of *employment* protection.

On July 23, 1939, Representative Harrington of Iowa rose and offered an amendment which, in his words, would protect "the railroad worker against any unemployment or any impairment of employment rights as a result of consolidations."[36] Since it was proposed as an amendment to a bill which already had been reported out of committee it

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[35] Explained in H.R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

[36] 84 Cong. Rec., Part 9, 76th Cong., 1st Sess., p. 9883.

was never the subject of hearings and its entire history and intended scope is to be found in the debates on the floor of the House.

Harrington Amendment

The suggested amendment of Mr. Harrington read as follows:

> "Provided however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." [37]

Two things were immediately apparent upon consideration of this proposed amendment. First, it had an entirely different objective than the provision for employee protection passed by the Senate and recommended by the House Committee since it sought to prohibit *permanently* the displacement or dismissal of employees as a result of mergers and consolidations rather than to afford them financial compensation after displacement or dismissal had taken place as provided by the terms of the Washington Agreement.[38] Second, it very definitely sought to *add* to the proposal advocated by the Committee of Six as well as by the Senate and House Committee. Had the amendment as originally proposed been adopted as a part of the finally enacted statute, no consolidations could have been effected thereunder which would have resulted in displacement or dismissal of employees. It would, therefore, have been necessary to keep all employees of the consolidating carriers in their jobs until such time as the process of natural attrition reduced their number to the level needed for a permanent working force, and further the amendment would have *prohibited displacement* from one position of employment to a position of less compensation. In short,

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[37] *Id.* at pp. 9881, 9882.

[38] Such adverse effect being a necessary prerequisite to the operation of the Agreement.

it was the object of this amendment to place a permanent "freeze" on railroad employment. This purpose obviously differed completely from that theretofore expressed.

The Harrington Amendment was adopted by the House and the bill passed on July 26, 1939. On July 29, the bill was sent to conference.

Regardless of the merits or demerits of the Harrington proposal, it is clear that its purpose and effect were thoroughly understood. While the bill was in conference, the Legislative Committee of the Interstate Commerce Commission sent a special communication to Congress which evidenced the Commission's complete understanding of the amendment but which condemned it in principle in the following language:

> "As for the proviso, the object of unifications is to save expense, usually by the saving of labor. *Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement'* of 1936 between the railroad managements and labor organizations. *The proviso, by prohibiting any displacement of employees,* goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."[39] (Emphasis supplied.)

D. First Conference Report

While the bill was pending before the Conference Committee, word apparently got out that the conferees were going to strike the Harrington Amendment. When this word reached the House, 275 members signed a petition

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[39] I.C.C. Report of January 29, 1940, p. 67.

addressed to the House conferees requesting that they not permit the Amendment to be stricken.[40]

On April 26, 1940, the Conference Committee reported out S. 2009. It eliminated all changes made by the Senate and House in the consolidation provisions of Section 5. The effect of this was to retain the provisions of Section 5 and Section 213 as then contained in the Interstate Commerce Act. With respect to the elimination of all mandatory employee protection from the bill the Conference Committee made the observation that "the elimination of a consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might have otherwise resulted from the provisions."[41]

The reason for this observation bears explanation. In the debate on the floor of the House it was established that the House conferees felt they were following the desires of the sponsors of the Harrington Amendment in eliminating the consolidation features of the bill and that such elimination would be a satisfactory substitute for the Harrington Amendment as originally proposed.

Mr. Welverton, one of the conferee managers on the part of the House and an opponent of the Harrington Amendment, concisely relates the history of the legislation leading up to the elimination of the consolidation section as follows:[42]

> "I will first direct your attention to the consolidation provisions of the bill, which included the Harrington amendment. The Senate bill did not contain the latter amendment nor any provision that approached it in similarity. Thus it was directly in dispute between the two Houses. After long and careful consideration of the matter by the conferees, it was decided that the

[40] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., pp. 5867-5868.

[41] H.R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

[42] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., pp. 5878-5881.

best possible manner to deal with the controversial amendment was to strike out all reference to consolidations, mergers, and so forth, in the bill, and thereby remove the cause of the fear of *wholesale dismissals that the Harrington amendment sought to protect railroad employees against.*

"Both the original House and the Senate bills, as reported by the respective committees, contained provisions which were thought to be sufficient to protect employees from dismissal. Each of the bills clearly and explicitly laid a duty upon the Interstate Commerce Commission to protect the employees by the following provision:

> 'The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interest of the employees affected.'

"This provision was suggested by the committee of six appointed by the President, consisting of three representatives of railroad management and three representatives of the railroad brotherhoods. The Committees adopted the language suggested by them. In doing so we thought we had provided reasonable safety and security for railroad employees against unwarranted dismissals resulting from railroad consolidation. In this view we had the unqualified support of 20 of the 21 railroad brotherhoods. They represented 92% of railroad labor. The Brotherhood of Railroad Trainmen, during the committee hearings, requested that all reference to consolidations be left out of the bill and that the law be permitted to remain as it was under the existing consolidation law and as it is now in the Interstate Commerce Act. This Brotherhood was evidently of the opinion that the rights of labor in case of consolidations, mergers, and so forth, were protected by the terms of the so-called Washington agreement that had been entered into by all of the 21 railroad brotherhoods with the management of most of the railroads of the country. This agreement was then and still is in force without any action by Congress. Believing that we were justified in accepting the viewpoint of 92% of railroad

labor, we reported the bill to the House with the consolidation provisions and with the language *that would guarantee to railroad labor the continuance of the protection gained by the Washington agreement* and also the possibility of gaining further rights by collective bargaining *or by action of the Interstate Commerce Commission.*

"When the bill came to the floor of this House an amendment to the consolidation section was offered by the gentleman from Iowa [Mr. Harrington]. This amendment was offered at the suggestion of the Brotherhood of Railroad Trainmen, which had requested at the committee hearings the elimination of the entire consolidation section. At no time, either in the Senate or House Hearings, had any such amendment as the Harrington amendment been offered or advocated by that or any other brotherhood. The most that the Brotherhood of Railroad Trainmen had ever suggested was that the old section be removed. And yet, now that the conferees have done what they had requested, they come before the House through their spokesman and object to what we have done.

* * * * *

"More than 76% of railroad labor has repudiated the viewpoint of those who seek recommitment and are actively supporting the bill."

[Herein follows a statement against recommittal by 15 of the 22 railroad Brotherhoods representing approximately 850,000 employees.]

"Before closing my remarks on the subject of railroad employment, I wish to bring to your attention and emphasize the fact that the conferees have done nothing in this bill that directly or indirectly will harm, disturb or deal unjustly with railroad labor . . .

* * * * *

"There is no justification for any Member of this House interested in railroad workers to vote against S. 2009." (Emphasis supplied.)

The House of Representatives, however, refused to accept S. 2009 as reported out of the Conference Committee. After

vigorous debate, the bill was recommitted with instructions, among others, that the *Harrington Amendment be insisted upon by the House conferees.* As recommitted the wording of the Harrington Amendment was modified to provide that the Interstate Commerce Commission must include in any order authorizing the consummation of transactions under Section 5:

> "terms and conditions providing that such transactions will not result in employees of said carrier being in a worse position with respect to their employment."[43]

The question that immediately presents itself is whether this language was intended to have the same effect as the original language found in the Harrington Amendment. The question is crucial in interpreting this provision as it is this language, limited in its operation to four years, which eventually became law as the second sentence of Section 5(2)(f).

The answer to the question is found in the comments of *all* members of the House who spoke in support of the Wadsworth motion to recommit and in the answer of Mr. Harrington himself to certain fears expressed by Mr. Lea who had opposed the original Amendment and opposed the motion to recommit. *No member* of the House at any time expressed a belief that the modified language eliminated preservation of employment rights as distinguished from compensation benefits from the scope of the Amendment.

Representative Warren who supported the Harrington Amendment and Wadsworth's motion to recommit made the following statement on the motion:

> "Two hundred seventy-five Members of this House solemnly petitioned the conferees [during the first conference] to retain the Harrington Amendment in the bill. Why was it left out [of the first conference report]? It was left out so the railroads could continue their policy of making jobless some of the finest labor in the world. *If those of you who signed the petition meant what you*

[43] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5886.

said, then the only way to give expression to it is to vote to recommit.

• • • • •

"If the House, Mr. Speaker, wishes to write its bill and wishes its will to be upheld rather than accept a new measure, written by 12 conferees, *where its will was ignored,* then you will vote to recommit this conference report with instructions *to place back in it* what you, by overwhelming majorities, had previously voted for. [Applause].

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"The safest vote, Mr. Speaker, for every Member of this House today is to vote to recommit this bill under the motion offered by the gentleman from New York [Mr. Wadsworth]."[44] (Emphasis supplied.)

Representative Thomas made the following statement on the motion to recommit:[45]

"Mr. Speaker, I am going to vote to recommit this bill with the hope that it can and will be perfected. The welfare and prosperity of my district depends, to a large degree, upon *continuous employment* for the many thousands of railroad workers who live there and upon the continued flow of agricultural products that are raised in the State of Texas, through the city of Houston.

"So without [sic] [46] the Harrington Amendment to protect those thousands of railroad workers, and without [sic] [46] the amendment of a distinguished colleague, the gentleman from Texas [Mr. Jones,], Chairman of the Committee on Agriculture, I am going to vote to recommit." (Emphasis supplied).

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[44] 86 Cong. Rec. 5867-5868.

[45] 86 Cong. Rec. 5883-5884.

[46] This appears to be a typographical error identical to that found in the Whitney letter quoted below, at pages 54 and 55, since Rep. Thomas would hardly have voted in support of a motion which did not contain the protection which he had stated his constituents so vitally needed.

Mr. Harrington, prior to stating the effect of the modified language as it appeared in the Wadsworth amendment, made this statement to the Members of the House:[47]

> "Two hundred seventy-five Members said when you signed that petition [to the conferees during the first conference requesting them to retain the Harrington Amendment] that you believed as I do, that labor should have protection. If you meant what you said then, now is the time to show these men that you did, and vote to recommit, . . ."

The foregoing quotations demonstrate conclusively that those who spoke in support of recommittal clearly understood that the term "worse position with respect to their employment" contained in the Wadsworth motion had the identical effect of the original language of the Harrington Amendment.

It should be pointed out that Representatives Lea and Wolverton were outspoken opponents of the original Harrington Amendment and the Wadsworth motion to recommit.[48] Representative Lea feared that the Wadsworth motion had added two new elements to the Harrington Amendment. He correctly thought that the Wadsworth motion would extend employment protection to railroad abandonments as well as consolidations and mergers. But he erroneously feared that the motion would give employees a choice of active employment or lifetime compensatory support if they decided not to continue in active employment.

This fear was twice expressed by Representative Lea in speaking against the Wadsworth motion. It first appears in an extension of Mr. Lea's remarks found in the Appendix to the Congressional Record of May 3, 1940, as follows:[49]

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[47] 86 Cong. Rec. 5869.

[48] In fact, of the 7 House conferees only one (Rep. Crosser) voted for Wadsworth's motion. The others voted against it. 86 Cong. Rec. 5886, 5887.

[49] 86 Cong. Rec., Appendix 2684.

"In its order approving any such transaction, the Commission shall include conditions providing that such transaction 'will not result in employees of said carrier or carriers being in a worse position with respect to their employment.'

* * * * *

"If the third provision above referred to would require the Commission in every case of consolidation or abandonment to include terms and conditions providing that such transaction will not result in employees 'being in a worse position with respect to their employment,' this provision would largely nullify the discretion given the Commission as to the first two proposals.[50] Under this provision, the Commission must, without limit of time, require that an employee for whom the employer no longer has any need *must be retained* at the expense of the employer *on a working salary basis or on a compensation basis* totally equalling that which the employee received while performing useful service for the carrier.

"This is a novel provision probably not heretofore written into any law in the United States. It would, by Federal law, impose upon an employer the duty of indefinite if not *lifetime support* of employees for whom he no longer has a job." (Emphasis supplied.)

Mr. Lea repeated his fears on the floor of the House on May 9, 1940:[51]

"This amendment goes beyond the Harrington Amendment. It includes abandonments, in case of substitute railroad service, and then it goes further and provides that these consolidations shall not be approved if they will result in employees being in a worse condition with respect to employment. That provision nullifies all the discretion given the Commission. It makes that condition of the employee the dominating

[50] The discretion referred to is that provided by the requirement of a "fair and equitable arrangement for employees." The proposals referred to are consolidation proceedings and abandonment proceedings.

[51] 86 Cong. Rec. 5864-5865.

consideration; if an employee is in any worse condition the consolidation cannot be approved.

"There is no time limit in which an employer is to maintain those men in a condition equal to that under which they were discharged."

That these fears were unfounded was made eminently clear by Mr. Harrington who confirmed the views contained in a letter from which he quoted at length and which had been addressed to Mr. Lea from Mr. Whitney, President of the Brotherhood of Railroad Trainmen, who had vigorously supported the cause of "employment protection" as found in the Harrington Amendment and the Wadsworth motion to recommit. The letter read as follows:[52]

"Your address, as reported in the daily Congressional Record of May 3, suggests that *your conception of the labor-protection provision is entirely erroneous*. You state that such a legal provision would have the effect of imposing 'on the employer the duty of indefinite if not a lifetime support of employees for whom he no longer has a job.' As a practical matter you must know that it is not so. Average railroad consolidations eliminate 20 to 25 percent of the employees. Without [sic] [53] the labor-protection provision these employees youngest in point of service will be spared that fate, and the eliminations would come from the other end of the seniority list, as deaths, resignations, and retirements occurred. Such attrition from deaths, resignations, and retirements, for all railroad employees now average upward of 5 percent per year; but for train-service employees who are most severely affected by consolidations, the attrition rate is between 2.5 and 3.5 per-

[52] 86 Cong. Rec. 5870.

[53] The word "without" here is a typographical error. This conclusion is confirmed by an examination of a copy of the original letter in the files of the Brotherhood of Railroad Trainmen and by an examination of the "Railroad Trainman" issue of June 1940, which contains a reprint of the letter. Both the copy and the reprint in the "Railroad Trainman" indicate that the word used by Mr. Whitney was "with".

cent. Thus, on the whole, employee eliminations from consolidations would be gradually and humanely absorbed within a short period of time, especially with an increase in railroad business which is claimed if S. 2009 is enacted into law. The only way in which you could be correct in your reference to lifetime support is to assume that the lifetime of railroad workers will be short indeed. Although we railroad employees feel somewhat hardier than that, it may be true that if you force tens of thousands of us into the bread line you will so shorten our span of life."

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"*You erroneously refer to the proposed labor-protection provision as a 'dismissal wage' proposition.* The dismissal wage is only another attempt to achieve national prosperity by providing meager compensation for nonproduction. Before concluding that such an arrangement is equitable, ask yourself if you would be willing to forego pursuit of your life's calling for a mere 60 percent of your present salary for a few months. Railroad employees want honest pay for honest work; *that is what the labor protection proposal offers.* A dismissal wage proposition proposes to buy up, at bankrupt prices, the jobs of needy workers." (Emphasis supplied)

Subsequent to quotation from this letter, Mr. Harrington again explained the meaning of the modified language found in the Wadsworth motion in a clear and unequivocal statement which was unquestioned by any member of the House:

"The motion to recommit, which will shortly be made by . . . [Mr. Wadsworth], will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, *with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment.* . . .

"The labor protective provision, which so many of us favor, is beneficial to all railroad employees. It protects the public against the slow death and the withering of entire communities, that always accompanies railroad consolidations. It is good for the railroad industry, because it will stay the hand of railroad

financial interests which, instead of squeezing the water out of the capitalization of that industry, are bent upon reducing the physical plant of our great railroads, so necessary in time of war or in time of peace and prosperity . . . *By adoption of this provision in the transportation bill, the government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers.* But this provision also contains a clause that permits the industry, through the process of collective bargaining, to work out its problems in a democratic manner.

"Without this labor protective provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. *With this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur.* If S. 2009 will bring to the railroad industry the prosperity its supporters contend for it, then *the natural attrition will shortly have absorbed the employees that otherwise would be eliminated* if this Congress does not now deal with this problem."[54] (Emphasis supplied.)

Only one other member of the House, Rep. Wolverton, may have expressed any concern[55] that the Wadsworth motion did not provide the same employee protection as had the original language of the Harrington Amendment. Representative Wolverton's remark came about in the following manner: Representative Bulwinkle, a member of the Conference Committee, was discussing the Wadsworth motion and was opposed to it. Mr. Wadsworth had just asked him whether recommittal would kill the bill. The following colloquy then took place:[56]

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[54] *Id.* at 5871.

[55] We say "may" have expressed concern because it is not at all clear whether Mr. Wolverton was speaking about the employee protection features of the Wadsworth motion or the fact that it extended protection to railroad abandonment, an area not theretofore subject to the provisions of the bill.

[56] 86 Cong. Rec. 5885.

Mr. Bulwinkle: "Oh, no; but I am saying that you can do practically nothing at all in the way of doing the things these other gentlemen are talking about."

Mr. Wolverton: "Will the gentleman make clear that the motion to recommit which it has been suggested will be made by the gentleman from New York [Mr. Wadsworth] does not contain the Harrington Amendment?"

Mr. Bulwinkle: *"I did not know that. I thought it would contain the Harrington Amendment."*

Mr. Wolverton: "It is an entirely different amendment. It seems as if the Harrington Amendment proponents have made an additional suggestion."

Mr. Bulwinkle: "Now we have a new Harrington Amendment today. What was wrong with the original?" (Emphasis supplied.)

Representative Bulwinkle obviously thought that the Harrington Amendment remained in the motion to recommit as did all other Congressmen who *supported* the motion for recommittal and whose views are expressed in the Congressional Record. As a matter of fact, Rep. Wolverton himself later recognized that the Wadsworth motion contained the Harrington Amendment for the Congressional Record discloses that he made the following statement with regard to the second conference report which became Section 5(2)(f):[57]

> "We [the conferees] have been able to obtain from the Senate conferees an agreement that *sustains the principle*, if not the exact language of the House, of the Jones [agricultural] and the Harrington amendments. This agreement as presented in *our report does not destroy the purpose or intent of either amendment.* And it is our understanding that the language agreed upon which in no way materially changes the Jones amendment and only slightly modifies the Harrington amendment, *is not opposed by those interested in having these amendments* written into the bill." (Emphasis supplied)

[57] 86 Cong. Rec. 10189.

Little more could be asked by way of clarity of Congressional intent. The author of the provision and all who spoke in its support stated that the modified language had precisely the same meaning as the original language. No one challenged these statements as erroneous. Nor was any challenge offered regarding the substantive effect of the modified language as stated by Rep. Harrington or the others who spoke in its support. Only Representative Lea expressed doubts, but his doubts were not to the effect that the modified language eliminated employment protection, to the contrary, Mr. Lea feared the modified language *added* the requirement that employees "must be retained . . . on a working salary basis *or on a compensation basis*" which would "impose upon an employer the duty of indefinite if not lifetime support" of those employees for whom there was no work.

But the authors and supporters of the modification unequivocally stated in open debate on the floor of the House that Mr. Lea's fears were unfounded as his "conception of the [modified] labor-protection provision is entirely erroneous"; that the modified language was "designed to accomplish the purposes intended to be accomplished" by the original language; and that under the modified language "job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur," in other words, that "natural attrition will shortly have absorbed the employees that otherwise would be eliminated." Mr. Lea did not take issue further with these corrective statements. Perhaps he felt that as Chairman of the House Conferees he could provide against them in conference if the motion to recommit was approved. Because of the fears expressed by Representative Lea and the rather vague objection of Representative Wolverton, it may be important to note here that the Harrington Amendment expanded the scope of its coverage by the

addition of the following language in the Wadsworth motion to recommit:

> "(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." [58]

In other words, the Harrington Amendment now sought to add to the list of transactions subject to employee protection "the substitution and use of another means of transportation for rail transportation proposed to be abandoned." Moreover, as is demonstrated by the above-quoted statement of Mr. Harrington, the modified language preserved without change the concept of employment protection. This latter provision was thus the same proposal to which the Senate Committee, the Conference Committee, and the Interstate Commerce Commission had already objected.

Prior to the vote on the motion to recommit Mr. Harrington succinctly stated his reasons for supporting the motion:

> "Mr. Speaker, when I offered my amendment last July, I did so because there was no protection in the bill for the employees in the event of consolidation, nor is there adequate protection for them in the present law, and it is for this reason, and this reason only, that I believe you should vote to recommit the bill, with instructions to the managers on the part of the House that they insist that the modified language for labor protection be placed in the bill together with the

[58] *Id.* at 5886.

change in the present law which will contain the consolidations sections requested by the railroads.

"There is not a railroad organization within the country which does not believe they should have *further protection* and those who have asked you to vote against recommitment are only doing so because they too have been mislead into believing that recommitment will kill the bill." [59] (Emphasis supplied.)

On the same day, May 9, 1940, the House by a vote of 209 to 182 adopted Mr. Wadsworth's motion to recommit directing its conferees to include, among other things, the substantively unrevised Harrington Amendment.[60]

E. Second Conference Report

Again the matter was considered by the conferees, and on August 7, 1940, the conference report was submitted to the respective houses.[61] The modified language was adopted by the conferees but was limited to four years' operation. The language agreed upon by the conferees now constitutes the provisions of Section 5(2)(f).

The conference report clearly explains the reasons for the time limitation placed on the Harrington Amendment:

"The House amendment included a proviso (the Harrington amendment) *prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provision in the Senate bill.*

• • • • • • • • • •

"The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the trans-

[59] *Id.* at 5869.

[60] *Id.* at 5886.

[61] H.R. Rep. No. 2832, 76th Cong., 3d Sess.

action shall not result in the employees being in a worse position with respect to their employment. The conference agreement, however, qualifies *this provision by confining its operation to a period of four years* from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.'"

"In other words, the Harirngton amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation."[62] (Emphasis supplied.)

It is clear from the explanation of Section 5(2)(f) by the Conference Committee that in the minds of the conferees

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[62] Conf. Report to accompany S. 2009, H. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68-69; reprinted in 86 Cong. Rec. 10167, August 12, 1940. The Commission relied heavily on the fact that the report uses the phrase "benefits to employees will be required to be paid" as indicating that only compensation protection was intended. Such an interpretation does not square with the remainder of the report quoted above nor with the fact that "employment protection" was the manifest object of the House and a departure from that object by its conferees would have had to take the form of something more definite than such a vague reference if intended to be effective. It is probable that this phrase merely evidences the continuing fears of Mr. Lea that employees might be paid compensation for life even though he recognized that they "must be retained on a working salary basis" in service of the railroad. The conference report merely limits the mandatory continuation of the benefits of the provision (retention on a working salary basis) to a period of four years.

the second sentence of Section 5(2)(f) was intended to provide mandatory employment protection limited to four years. The first sentence was designed to require a fair and equitable arrangement by the Commission for the protection of employees affected by transactions authorized under Section 5. It was mandatory only in that sense. It was discretionary in the sense that the nature and extent of the protection to be afforded was for the Commission to decide. No limitation in point of the type of protection or in point of time is suggested. On the other hand, the second sentence deals with a specific minimum type of protection, preserving to the employees their employment with the carriers concerned but limiting that particular protection to a period of four years from the effective date of the Commission's order. The *only* limitation imposed upon the employment protection amendment introduced by Mr. Harrington was the period of time it was to be effective.

The debate on the floor of the House on the adoption of the second conference report, particularly the statements made by House members of the Conference Committee, provide conclusive support for these conclusions. In referring to these debates, it is important to note that the term "Harrington Amendment" was synonymous with "employment protection" in the minds of the members of the House—no one intimated otherwise.

In explaining the intention of the conference committee to the House, Representative Lea, Chairman of the House Conferees, stated:[63]

> "The substitute that we bring in here provides two additional things. *First there is a limitation on the operation of the Harrington Amendment for 4 years from the effective date of the order* of the Commission approving the consolidation. In other words, the employees have the protection against *unemployment* for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees

[63] 86 Cong. Rec., Part 9, 76th Cong., 3rd Sess., p. 10178.

themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference report.

"There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so that the railroad company will not be required to maintain him *in no worse condition as to his employment* for any longer period than he worked before the consolidation occurred.

"We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. *We take nothing from labor by this agreement.* We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands." (Emphasis supplied)

Rep. Lea here states that two, and only two limitations were placed upon the Harrington Amendment by the Conference Committee and both of these restrictions related to the time during which the substantive provisions of the amendment would be effective.

Identically the same views as to the intent and full force of the second sentence of the section were expressed by Representative Wolverton, another member of the Conference Committee:[64]

"Now, as to the Harrington amendment,[65] the conferees have adopted *practically the same language as originally adopted by the House,* but with a modification *as to the length of time* the provisions are to be

[64] Id. at p. 10189.

[65] Which Rep. Wolverton had opposed.

effective. This amendment, as you are all possibly aware, was not in the Senate bill in any form whatsoever. Objection was made that the amendment, in the language adopted by the House, would *guarantee for life the employment of any and all employees of railroads participating in a consolidation or merger of their lines* even though the employee's service may have been as little as a month, or even less; and, furthermore, if there was no work for them as a result of the consolidation or merger, yet their compensation would continue upon the same basis as at the time of consolidation and until death or their voluntary separation from the service of the company.

"In fact there were some who were of the opinion that it *froze every job* for the employee in service at the time of consolidation but also *froze perpetually every job* which existed at the time of the consolidation or merger. So, even death or resignation of the employee did not end the job. It would descend to someone else even though not in the employ of the railroad at the time of the consolidation or merger. And, then there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.

"I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment. It was recognized that the real intent of the sponsors was to save railroad employees *from being suddenly thrust out of employment as the result of any consolidation or merger or entered into.* The Committee on Interstate and Foreign Commerce of this House is presenting its original bill used language which it thought accomplished that purpose. We thought we were giving legislation assurance of at least a continuance of the Washington agreement which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce

Commission as a condition precedent for its approval of the Rock Island case, *United States* v. *Lowden* (308 U.S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future. Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining.

"The conferees have struggled long and hard to agree upon language which would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that *it is acceptable to all* who are to be affected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers *protection against sudden dismissal and financial assistance* that is not enjoyed by workers in any other industry. And this is

true without any exception or qualification whatsoever."[66] (Emphasis supplied.)

The foregoing explanations by an avowed opponents of the Harrington Amendment establishes beyond question that the intention of Congress in writing the second sentence of Section 5(2)(f) was to *protect the employment* of all employees of carriers involved in proceedings arising under Section 5(2) *for a period of at least four years* from the date of the Commission order approving the transaction. This protection was intended to be the minimum protection afforded by the statute.

The statements by Congressmen Lea and Wolverton were not challenged or contradicted by any member of the committee. They support unequivocally the express language contained in the statute and refute with equal strength any construction which would limit protection afforded by that provision solely to compensation.

On August 30, 1940, the bill was submitted to the Senate[67] and again debated, and after debate, which only briefly concerned the Harrington Amendment, the bill was passed on September 9, 1940.[68]

Immediately after the Senate adopted the Conference Report containing Section 5(2)(f) as we now know it, Senator Wheeler, the sponsor of the 1940 Act in the Senate, asked and was granted unanimous consent "to insert in the *Record* a statement giving some explanations of certain provisions which were changed [from the original S.

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[66] Rep. Wolverton apparently attempts to equate "employment" protection with "compensation" protection but nowhere suggests that "employment" protection was removed by the conferees. Rather, Mr. Wolverton's statement confirms the fact that the "employment protection" character of the amendment remains unchanged.

[67] 86 Cong. Rec., Part 10, 76th Cong., 3rd Sess., p. 11269.

[68] Id. at p. 11766.

2009]." He stated that he desired to have these explanations in the *Record* because [69]

> "I feel they would be helpful to the Interstate Commerce Commission in *interpreting* the various provisions of the Act." (Emphasis supplied)

With regard to Section 5(2)(f), this explanatory statement simply read: [70]

> "Present law is also amended *by inclusion of the Harrington Amendment*, protecting employees in the event of consolidations . . ." (Emphasis supplied)

On September 18, 1940, the bill was signed by the President.

The legislative history of Section 5(2)(f) is lengthy because of the struggle over the Harrington Amendment in the House. It is important, however, because it presents a conclusive demonstration that the provisions of Section 5(2)(f) were at all times a subject of controversy only as between two opposing labor groups, one insisting that the statute should require that no employee could be placed in a worse position with respect to his employment as a result of the transactions approved under Section 5(2) and the other satisfied that the measure of protection could be left to the Commission's judgment and could take the form of "compensation protection." A compromise resulted. That compromise was never in any sense a subtraction from the original Harrington Amendment except as to the length of time in which it was to be effective.

We submit that the legislative history of this provision precludes any construction which would provide less than four-year employment protection to every employee of every carrier affected by the approval of a transaction approved under Section 5(2).

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[69] Ibid.

[70] Id. at 11768.

In reviewing legislative history, this Court has cautioned:

> "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Mastro Plastics Corp. et al.* v. *N.L.R.B.*, 350 U.S. 270, 288n, 76 S.Ct. 349, 100 L.Ed. 309; *Schwegmann Bros* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 71 S.Ct. 745, 95 L.Ed. 1035; see also *S. H. Camp & Co.* v. *N.L.R.B.*, (6th Cir.) 160 F.2d 519, 521 and cases cited therein.

That is what has been done here and the words of the author and sponsors of the Harrington Amendment demonstrate conclusively that for a period of four years from the Commission's order all economies to be made at the expense of employees must come from the "other end of the seniority list, as deaths, resignations and retirements occur" through "natural attrition."[11]

If any further evidence be desired regarding Congress' view of the type of protection it afforded by enactment of the Harrington Amendment, it can be found in the legislative history of a statute enacted three years later. The Communications Act of 1943, 47 U.S.C. § 222(f), 57 Stat. 5, was enacted for the same reason as Section 5(2) of the Interstate Commerce Act, i.e., to aid a financially floundering industry, in that case the telegraph industry. It was enacted to permit the merger of the Postal Telegraph Company into the Western Union Company. At that time those companies all but constituted the telegraph industry in this country.

Congress intended, and eventually did provide for the protection of the employees in that industry. Section 222

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[11] Ironically, Representative Harrington voted against passage of the second conference report. He did not take this position because he disagreed with the time limitation placed upon the employment protection in the report but only because the conferees had eliminated railroad abandonments from its purview. 86 Cong. Rec. 10187, 10192.

(f)(1) provides that employees of such merged telegraph carriers who were employed on March 1, 1941, must be employed by the carrier resulting from the merger for not less than four years and that during such period "no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry." Subsection (7) further provides that no such employee "shall, without his consent, have his compensation reduced, or * * * be discharged or furloughed during the four-year period."

At first glance it is clear that this employment provision went well beyond Section 5(2)(f) in two respects. It did not limit employment protection to the length of an employees' previous service if less than four years and it protected an employee from discharge or furlough *for any reason* and not solely for reasons connected with mergers as had Section 5(2)(f). In fact, not even the provisions of the Emergency Railroad Transportation Act of 1933 went so far. Certain members of the Senate recognized this fact and opposed such an extension of protection.

It is clear, however, that the Senate was well aware of just how far it had gone in enacting the Harrington Amendment. A statement of Senator Hawks which was read by Senator Taft on the floor of the Senate during the debate on Section 222(f) points this out. Senator Hawks' statement as read by Senator Taft is as follows:[72]

> "The provision protecting employees of any merged company that occurs under this act should not be any more exacting on the merged companies than the provisions contained in the amendment of 1940 to the Interstate Commerce Act authorizing the consolidation and merger of railroads. The merged company should not be compelled to keep employees, who under ordinary conditions, could be dismissed by either of the companies merging. The purpose of the act should

[72] 89 Cong. Rec., Part 1, 78th Cong., 1st Sess., p. 1195.

be to protect only employees who might be discharged as the result of the merger itself. . . . I do not believe the protection should go to the point of guaranteeing employment to those who would have been released in any event regardless of the merger." (Emphasis supplied.)

Section 5(2)(f) did not protect employees from being discharged under "ordinary conditions" and, in the opinion of Senator Hawks and others, neither should the Communications Act of 1943. If anyone opposing the employee protection feature of the 1943 Act had for a moment believed that Section 5(2)(f) did not protect employees from furloughs or dismissals resulting from the merger it seems reasonable to assume that they would have used that view to oppose the type of provision with which they were faced. It is of significance that they did not.

V

EXPLICIT RECOGNITION OF THE EFFECT OF THE SECOND SENTENCE OF SECTION 5(2)(f) BY THIS COURT

On March 27, 1950, this Court issued its decision in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721. This case is important to a consideration of the primary issue now before this Court because of the thorough review given the legislative history of Section 5(2)(f) and the Court's clear indication of its view of the intent and meaning of the Harrington Amendment as it appears in the second sentence of that provision.

This Court reviewed the legislative history of Section 5(2)(f) with particular reference to its first two sentences and the power of the Commission to protect employees beyond the "four years" provided in the second sentence. The opinion clearly indicates that the instruction given to the House conferees on recommitment did not change the substance of the Harrington Amendment but merely its

wording.[75] In order to demonstrate the Court's thorough familiarity and understanding of the Harrington Amendment, both before and after its modification, we quote from the discussion of that amendment in the opinion (339 U.S. at 151-154):

> "The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidation, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, *threatened to prevent all consolidations to which it related.*
>
> "With the Harrington Amendment in it the bill went to conference. It came out with all provisions relating to consolidations under § 5 eliminated. The House, however, recommitted the bill to conference with instructions to insert a modified form of the first sentence of § 5(2)(f), together with a modified form of the Harrington Amendment. The modification of the first sentence merely extended the original language as to fair and equitable arrangements so as to include abandonments as well as consolidations. The modification of the Harrington Amendment is not now material.
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> "The second conference reported § 5(2)(f) in the final form in which it was enacted into law. It retained the first sentence in its original language. In the second sentence, however, it included a *substantial change* in the Harrington proposal. It *limited it to the*

[75] With regard to the substance of the original Harrington Amendment, the Supreme Court stated as follows (339 U.S. 151, n. 13): "This proposal was not without precedent. In the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, there were many temporary provisions which originally were to expire in 1934 and finally did expire in 1936. Among these was § 7(b). It provided that no employee was to be deprived of employment or be in a worse position with respect to his job [actually 'compensation'] by reason of any action taken pursuant to the authority conferred by the Act. That provision, on a temporary and independent basis, thus co-existed with the permanent amendments which were then made to § 5 of the Interstate Commerce Act, including § 5(4)(b)."

four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order of approval. This clause emphasized the separability of the second sentence, for it provided that 'the protection afforded to any employee pursuant *to this sentence* shall not be *required* to continue for a longer period, . . .' than that prescribed. (Emphasis supplied by Court)

"The second sentence thus gave a limited scope to the Harrington Amendment and *made it workable by putting a time limit upon its otherwise prohibitory effect.* There was no comparable need for such a restriction upon the first sentence. We find, therefore, that the time limit in the second sentence now applies to it and to it alone. As thus limited, *that sentence adds a new guarantee of protections to the interests of employees,* without restricting the Commission's power to require *greater* protection as part of a fair and equitable arrangement. This serves the purpose of the sentence to *increase rather than to decrease,* the protective effect of the paragraph." (Emphasis supplied)

The opinion clearly states that the only change made in the Harrington Amendment, through a "substantial change," merely placed a time limit upon its operation and nothing more:

"The second sentence thus gave a limited scope to the Harrington Amendment and made it workable by putting a time limit upon its otherwise prohibitory effect."

We respectfully submit that no language used by this Court could have been more definitive than that set forth above. If any doubts could exist regarding the Court's view of the express requirements of the second sentence of Section 5(2)(f), they should have been forever put to rest on April 18, 1960, when this Court issued its decision in Case No. 100, October Term, 1959, *The Order of Railroad*

Telegraphers, et al. v. *Chicago and North Western R. Co.*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed. 2d 774.

That case involved a question of whether an addition to a collective bargaining agreement proposed by The Order of Railroad Telegraphers which provided,

> "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization,"

was a bargainable issue under the provisions of the Railway Labor Act, as amended, 48 Stat, 926, 45 U.S.C. 151, et seq.

The Court held that such a provision was covered by the Railway Labor Act as a bargainable issue under its provisions. As support for its conclusion, the Court said that both the "Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." (362 U.S. at 337.) The Court then relied upon Section 5(2)(f) as follows (362 U.S. 337):

> "Where combinations and consolidations of railroads might adversely affect the interest of employees, Congress in the Interstate Commerce Act has expressly required that before approving such consolidations the Interstate Commerce Commission 'shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.' It requires the Commission to do this by including 'terms and conditions' which provide that for a term of years after a consolidation employees shall not be 'in a worse position with respect to their employment' *than they would otherwise have been.*" (Emphasis supplied)

Lest there be any misunderstanding that the Court here interprets Section 5(2)(f) as requiring employment protection and not mere compensation protection, it should be noted that not only was this statement made in support of

the Court's holding that a railway union has the statutory right to bargain with management about provisions in their agreements which would have the effect of stabilizing employment but also that the entire Court fully appreciated the meaning which had been assigned to Section 5(2)(f).

This latter fact is confirmed by reference to the dissenting opinion which disagreed with the Court's conclusions and, in referring to the above-quoted finding of the Court, says (362 U.S. 355):

> "... nothing in it [§ 5(2)(f)] authorizes the Commission to freeze existing jobs."

And at 362 U.S. 356-357, the dissenting opinion continues:

> "Of the Harrington proviso, this Court said in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, that 'it threatened to prevent all consolidations to which it related [but Congress] made it workable by putting a time limit upon its otherwise prohibitory effect.' 339 U.S. at 151, 153. But Congress actually did more. It eliminated any power to freeze jobs."[74]

The dissent here clearly recognizes the language quoted from the 1950 decision of the Court as interpreting the four year time limit as the *only* limitation or restriction placed upon the otherwise complete and permanent employment protection contemplated by the Harrington Amendment.

The decision in the *Order of Railroad Telegraphers* case involves the question of "stability of employment" under the Railway Labor Act. To support that decision, the Court cited Section 5(2)(f) of the Interstate Commerce Act and, we respectfully submit, in doing so clearly recog-

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[74] It is respectfully submitted that even if the second sentence of Section 5(2)(f) did not *require* employment protection the Commission would have the discretion to provide such protection under the broad power given it by the first sentence of that provision.

nized that Section 5(2)(f) was enacted to preserve employment rights in the railroad industry for a limited period following merger or consolidation authorizations.

Whatever may be said regarding arguments heretofore advanced on this subject, it would now seem to be clear that this Court has specifically interpreted Section 5(2)(f) as requiring the Commission to provide, as a minimum, employment protection for all employees for a period of four years following approval of a merger and if such protection would not protect *all* employees [75] something more must be provided to insure fair and equitable protection beyond the four-year period.

VI

ANALYSIS OF THE DECISIONS OF THE COMMISSION AND THE DISTRICT COURT

A. The Commission

The Commission's decision in this case relies upon cases involving job abolishments and job transfers which it decided in 1941, 1942 and 1944. (R. 20-21.) Those cases were cited in an attempt to demonstrate a long-standing and consistent administrative interpretation of the provisions of Section 5(2)(f). The particular issue which was presented to the Commission by the RLEA in this case and which is now presented to this Court, was never raised and therefore never passed upon by the Commission in the cases which it cited in its report. Even if such issue had been considered and decided by the Commission adversely to plaintiff in 1941, 1942 or 1944 and consistently followed by that agency thereafter, it would not be controlling here.

In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, discussed *supra*, and *Interstate Commerce Commission* v. *Railway Labor Executives' Associa-*

[75] As it would not have in the *New Orleans* case or in this case since it is admitted that many employees will not be affected until the fifth year after ICC approval. (R. 112.)

tion, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904 (1942), both of which involved the Commission's interpretation of its power to impose employee protective conditions, this Court rejected the Commission's "contemporaneous construction."

In their brief to the District Court, the United States and the I.C.C. attached an appendix which listed all reported cases decided by the Commission pursuant to the provisions of Section 5(2). That appendix, in the exact form in which it appeared in the Government's brief, is attached hereto as Appendix A to this brief. It will be noted that the first twenty-one cases reported included no employee protective conditions and it was not until May of 1946 that the Commission recognized its statutory obligation to impose employee protective conditions in *every* order of approval issued pursuant to Section 5(2). This recognition came after the Commission had decided ninety reported cases. Of those ninety cases, employee protective conditions were imposed in but seven and in those seven the conditions imposed were those agreed to by the parties or suggested by the labor representatives themselves as befitting the particular type of case involved. See *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285, 293-294; *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 252 I.C.C. 49, 64-65; *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 193, 196; *Gulf, M. & D. R. Co. Purchase, Securities*, 261 I.C.C. 405, 434.

No one now questions the requirement of Section 5(2)(f) that the Commission must impose some type of employee protection in every case it decides under this statute. However, the first case in which the Commission recognized this requirement was decided on May 29, 1946, *Chicago & North Western Ry. Co., Merger*, 257 I.C.C. 672; only then did the Commission begin the practice of imposing protective conditions in all cases arising under Section 5(2).

In light of this history, it would seem that the Commission has been unfortunate in its "contemporaneous construction" of at least two requirements of Section 5(2)(f)

and the appellants here submit that if it had ever rendered a positive "contemporaneous construction" of the issue presented here, which is denied, the Commission erred in construing a third requirement of that section.

The Commission concluded its decision by stating that employment protection would violate the National Transportation Policy as enunciated in the Transportation Act of 1940 which is stated as the promotion of "efficient service and [fostering of] sound economic conditions in transportation." [54 Stat. 899] (R. 26.) Such a conclusion is completely unsupportable for two reasons, first, it supersedes the express language of a statute with an administrative agency's interpretation of the general language contained in a policy statement; and second, it ignores the fact that Congress included a complete and indefinite preservation of employment provision in the 1933 Act which was passed "to save certain railroads from bankruptcy and to perpetuate an efficient means of interstate [railroad] transportation in the United States." *Louisville and N. R. Co.* v. *United States* (N.D. Ill., 1934), 10 F. Supp. 185, 191 (see also page 27, *supra*). It also did precisely the same thing when it passed the Communications Act of 1943, permitting Western Union to take over Postal Telegraph Company, both of which were in extremely bad financial condition.[76]

The Commission's report also referred to *Lowden* v. *United States*, discussed *supra*, and *Railway Labor Executives' Association* v. *United States, supra*. In referring to this Court's decision in the latter case, it said that "the Court characterized our practice as affording employees 'compensatory protection' and apparently thought it was consistent with the statute. (R. 25-26.) Significantly, the Commission did not refer to that portion of the Court's decision in which it is clearly said that the only limitation which Section 5(2)(f) placed upon the "otherwise unworkable provisions" of the Harrington Amendment was a four-

[76] 88 Cong. Rec., Part 1, 77th Cong., p. 5419.

year time limitation. The Commission failed to refer to *The Order of Railroad Telegraphers* case, *supra*, in which this Court reiterated its interpretation of Section 5(2)(f) in this respect.

The Commission placed great reliance upon two short colloquies which took place on the floor of the House between Chairman Lea and Representatives Vorys and O'Connor immediately after Mr. Lea had presented to the members of the House his very complete and carefully prepared statement of the intent and effect of the Harrington Amendment as limited by the Conference Committee and which is set forth at pages 63 and 64, *supra*. (R. 23.) These informal colloquies appear to be the only reference in the entire legislative history of Section 5(2)(f) which might be looked to for support of an argument that the mandatory protection provided by Congress was limited to financial compensation only. In order to accept such an argument, however, one must ignore virtually everything else in the Congressional Record relating to this subject. Further, these colloquies are susceptible to an interpretation which supports a Congressional intent to impose *employment* protection.

Mr. Vorys asked if the protective benefits would run for four years from the date of the order "whether or not they [employees] were still employed" and Mr. Lea answered "Yes." Mr. O'Connor then asked if the term "worse position" in the phrase "worse position with respect to employment" meant that an employee's "compensation will be just the same for a period of four years, assuming that he were employed for four years, as it would if no consolidation were effected."

Mr. Lea said that he took "that to be the correct interpretation of those words" and immediately stated:

> "Our conference report followed the instructions of the House in that respect. It gives railway labor gen-

erous protection against sudden and long unemployment.'"[77]

Reliance upon such short informal statements is untrustworthy at best. For example, Mr. O'Connor's statement could be interpreted as indicating that he knew an employee would have to be continued in the employment of the railroad for a period of four years and was merely interested in determining whether or not, during that time his compensation could be no less than that which he had previously received. Mr. Vorys' question could be interpreted as implying that the "four year" provision required the railroad to maintain jobs for all employees even though there might be little or no work for some of them. In any event, Mr. Lea in his answer to Mr. O'Connor relied upon the instructions given the House conferees and stated that the Conference Report followed the instructions of the House. (See *supra*.)

The Commission also relied upon a statement of Representative Halleck to the effect that Section 5(2)(f) provided only compensation protection. (R. 23-24.) Here again we are confronted with the dangers of reliance upon informal statements of individuals who neither sponsored nor had primary responsibility for carrying out the will of the House because the record shows that Mr. Halleck was possibly the only member of the House of Representatives who thought that the *original* language of the Harrington Amendment provided no more than compensation protection.[78]

The Commission also quotes Representative Wolverton as follows (R. 25):

". . . Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sud-

[77] 86 Cong. Rec. 10178.

[78] 86 Cong. Rec., Part 9, p. 10187.

> den dismissal and *financial assistance* that is not enjoyed by workers in any other industry."

The emphasis is supplied by the Commission. It is to be noted that Mr. Wolverton here refers to "protection against sudden dismissal and financial assistance." The Commission apparently reads this statement as if it said "protection against sudden dismissal *solely by* financial assistance."

The Commission then reaches the conclusion (R. 26) that imposition of employment protection rather than compensation protection "would not be consistent with the public interest" because "conditions calculated to preserve *unneeded* jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers." (Emphasis supplied)

There are no findings in the Commission's report which support a conclusion that the imposition of employment protection would preserve "unneeded" jobs. To the contrary, the only reference in the report relative to the effect of employment protection is found in the following sentence (R. 19):

> "It [the Association] contends that since the only employees which will be affected by the merger are those, estimated by the applicants to be 863 in number, who would refuse to transfer their place of employment and who would have to transfer in order to obtain protection, if their employment were protected instead of their compensation, it would be to the advantage of the applicants if section 5(2)(f) of the act were interpreted as requested by the association."[9]

[9] Though perhaps it is of little moment, the record will show that the railroads and not the Association made this claim. (R. 112, 184)

The Commission does not take issue with this contention and, therefore, insofar as the Commission's decision is concerned this is its only finding regarding employee adverse effect. It is based upon Exhibit H-48 (R. 112, 184) and statements by railroad counsel at oral argument that only 863 men would be deprived of their jobs as a result of the merger and these men would be so deprived only because they would refuse (in the carrier's judgment) to accept available jobs at other points on the system *which they would have to accept* under "employment" conditions if they were imposed. In other words, the Commission's decision and the railroad exhibit demonstrate the fact that were employment protection imposed in this case these 863 employees would be transferred to *needed* and *available* jobs at other points on the Erie-Lackawanna system and if they refused to transfer they would receive no protection whatever. Certainly such a record does not support a gratuitous finding that employment conditions in this case would preserve "unneeded" jobs.

B. The District Court

When appellants presented their case to the District Court they relied upon the interpretation of Section 5(2)(f) set forth in this Court's opinions in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721, and *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed. 2d 774. Appellants also pointed out the recognition given by the dissenting opinion in the *Telegraphers* case to this Court's interpretation of Section 5(2)(f) in the *Railway Labor Executives' Association* case and the dissenting opinion's disagreement with that interpretation. The District Court, however, ignored the specific portions of those opinions upon which appellants relied stating that it deemed the specific holding of this Court in each case to be "inapposite to the issue here." (R. 202.) The District Court noted that the dissenting opinion in the

Telegraphers case "specifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to 'freeze existing jobs.' The majority opinion, however, never reached this question." (R. 202.)

The appellants also relied upon the legislative history of Section 5(2)(f). The entire legislative history of that provision was laid before the District Court. That court, however, dismissed this compellingly clear record of congressional intent with the single comment: "Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent." (R. 201.)

The District Court relied upon that "contemporaneous construction" doctrine holding that the Commission in its 1941 report "referred to 5(2)(f) as granting only compensatory benefits." (R. 201.) The portion of the report relied upon by the court, however, merely states the type of conditions the Commission imposed and makes no affirmative statement that such conditions are the only conditions required by Section 5(2)(f). Even if the statement contained in the 1941 report of the Commission could be considered "contemporaneous construction," it is at best a negative construction. In any event, it was established by this Court in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373, 380, 67 S.Ct. 717, 86 L.Ed. 904, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.

The District Court relied heavily on articles, not introduced in evidence, from 1940 issues of magazines of five of the twenty-three railway brotherhoods affiliated through their chief executive officers with the Railway Labor Executives' Association. The court stated that these articles clearly assert the brotherhoods' understanding of Section

5(2)(f) as granting compensation to employees who lose their jobs as a consequence of merger. (R. 201.) Reliance upon this type of material is clearly contrary to decisions of this Court such as *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L.Ed. 884. The articles cited are from magazines of a small minority of railroad brotherhoods and, at that, brotherhoods which *opposed* the Harrington Amendment because they felt insistence upon its enactment would kill the entire provision relating to mergers. In any event, the off-the-record opinions of laymen as to the effect of legislation upon them should have no bearing on the proper interpretation of that legislation by the courts.

The District Court relied upon a claimed Congressional awareness of the "construction" placed upon Section 5(2)(f) "by those interested in its interpretation and enforcement" and of the "failure" of Congress to do anything by way of clarification. (R. 202.) Of course, there has been no reason for the Congress to modify Section 5(2)(f) regarding the protection it affords employees because the issue presented here has never before arisen. Moreover, such a ground was rejected by this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373, 62 S.Ct. 717, 86 L.Ed. 904, as a means of interpreting the provisions of paragraphs 18 through 20 of section 1 of the Interstate Commerce Act (41 Stat. 477, 49 U.S.C. § 1(18)-(20)) subsequent to the passage of Section 5(2)(f).

The District Court also held that the plain language of the provision in question "mitigates against the plaintiffs' contention" because subparagraph (f) is "couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition much less that of guaranteed employment." (R. 199.) The court agrees that the controlling phrase is "in a worse position with respect to employment" (R. 199) but claims that had Congress desired to protect employees with respect to their

employment it would have followed the precise language it used in the 1933 Act or the after-enacted Communications Act of 1943, 57 Stat. 5, 47 U.S.C. § 222(f). The fallacy in the District Court's reasoning here extends beyond its failure to give to the language of the controlling phrase, and particularly the term "employment", its ordinary, commonly accepted meaning; it also refuses to recognize the obvious fact that Congress in modifying the Harrington Amendment combined into one phrase the *words and substance* of the two phrases contained in the employment protection provision of the 1933 Act. The District Court failed to acknowledge the additional fact that the legislative history of the Communications Act of 1943 shows that Congress in 1943 recognized that employment protection had been granted railroad labor in Section 5(2)(f).

Finally, the District Court affirmatively held that "worse position with respect to their employment" does not protect employment, however, the court makes no affirmative finding as to what it otherwise possibly could be intended to protect; yet it holds that there is no "ambiguity within the structure of 5(2)(f)." (R. 200.)

The District Court in arriving at its decision in this case failed to apply the innumerable decisions of this Court applicable to statutory construction to the effect that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else is meant." *United States* v. *First National Bank*, 234 U.S. 245, 258, 34 S.Ct. 846, 58 L.Ed. 1298, and cases cited *supra* at page 34.

The District Court also failed to apply the rules laid down by the decisions of this Court in determining from legislative history the meaning of statutory words which may be in doubt. *Mastro Plastics Corp. et al.* v. *N.L.R.B.*, 350 U.S. 270, 288, and cases cited *supra* at page 68.

Finally, the District Court proceeded contrary to the rulings of this Court in relying upon off-the-record material

contained in magazines as an aid in examining the legislative history of the statute. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L.Ed. 884.

VII

THE DISTRICT COURT ERRED IN RELYING UPON OFF-THE-RECORD MATERIAL WHILE REFUSING TO ACCEPT UNCHALLENGED SWORN TESTIMONY

At the hearing on the merits before the three-judge court, the testimony of H. C. Crotty, taken previously before Judge Thornton, was offered but not received in evidence. (R. 178-179.) This testimony amplified the evidence of record before the Commission by describing the effects of mergers on employees, as well as the effects of the application of the "New Orleans conditions." (R. 175, 178-179.)

The three-judge court erred in refusing to receive and consider such evidence. It compounded the error by itself considering matters outside of either record.

In *United States* v. *State of Idaho*, 298 U.S. 105, 109, 56 S. Ct. 69, 80 L.Ed. 1070, this Court said:

> "* * * The case was heard before three judges. The sole controversy was whether the trackage was a 'spur' or 'industrial track'; and, therefore, excluded from the jurisdiction of the Interstate Commerce Commission. The record made before the Commission was introduced in evidence; also some testimony 'which merely amplified evidence already in the record.' * * *"
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> * * * * * * * * * *
>
> "* * * Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. * * * Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellees' counsel

concede, the court did not err in admitting the additional testimony. * * *"

In *Baltimore & Ohio Railroad Company* v. *United States of America*, 298 U.S. 349, 353-4, 372, 56 S. Ct. 797, 80 L.Ed. 1209, the plaintiffs claimed that the Commission's order deprived them of their property without just compensation and this Court held:

"* * * The complaint assails the order upon the grounds that it is based on a misconstruction of the Act and is confiscatory. The case was tried by three judges. In addition to the evidence given before the commission there were offered and received at the trial the testimony of many witnesses and much documentary evidence. The court held plaintiffs not entitled to relief and dismissed the case. They appealed."

* * * * * * * * * *

"Appellants appropriately invoked judicial power to obtain constitutional protection against the commission's order. The district court rightly held them entitled to introduce evidence in addition to that contained in the record before the commission and rightly proceeded upon consideration of all the evidence to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question." (298 U.S. at 353-354, 372.)

In light of the fact that the Crotty testimony amplified the record it should have been admitted and relied upon. The magazine articles, on the other hand, which were never offered should not have been relied upon. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L.Ed. 884.

CONCLUSION

For the reasons stated, the judgment and order of the District Court is erroneous and should be reversed with directions to set aside as contrary to law that part of the Commission's report and order of September 13, 1960, which holds that it is not required by statute to protect the employment position of all employees involved; to direct the Commission to take such action as will provide employment protection consistent with the requirements of Section 5(2)(f), and to issue a permanent injunction based upon the temporary restraining order now in effect which will remain effective until such time as the Commission has complied with those requirements of Section 5(2)(f).

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APPENDIX

APPENDIX A

The following are the reported Section 5 cases decided since the enactment of Section 5(2)(f) on September 18, 1940, and reported in the bound volumes of Commission reports:

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
12830	10-18-40	Union Term. Ry. Co. & St. Joseph Belt Ry. Co. Control	242 ICC 197	No	None
13007	10-29-40	Illinois Central R. Co. Operation	481	No	None
12992	11-9-40	Virginian Ry. Co. Operation	503	No	None
12958	11-26-40	Madison, I. & St. L. Co. Purchase	586	No	None
13076	11-28-40	City of Galveston Acquisition, Operation, and Bonds	605	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
12973	11-29-40	Denver & R. G. W. R. Co. Trustees Abandonment	242 ICC 619	No	None
12975	12-3-40	Wichita Falls & S. R. Co. Acquisition	659	No	None
13028	12-3-40	Chesapeake & O. Ry. Co. Operation	665	No	None
13026	12-18-40	Pennsylvania R. Co. Operation	693	No	None
12382	12-21-40	Dayton Union Ry. Co. Acquisition	727	No	None
13003	12-21-40	Baltimore & O. R. Co. Operation	763	No	None
13008	12-30-40	Texas & P. Ry. Co. Operation	775	No	None
13015	1-7-41	Erie R. Co. Trustees Purchase	244 ICC 13	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13017	12-30-40	Atchison, T. & S. F. Ry. Co. Operation	244 ICC 33	No	None
13058	1-25-41	Winchester & W. R. Co. Purchase	151	No	None
13156	1-27-41	Atchison, T. & S. F. Operation	173	No	None
11317	2-13-41	Louisiana & A. Ry. Co Operation	235	No	None
12414	3-4-41	Minneapolis & St. L. R. Co. Reorganization	357	RLEA	Juris. Reserved
12698	4-9-41	New York Central R. Co. Operation	550	No	None
13118	4-7-41	Louisiana & A. Ry. Co. Operation		No	None
13100	4-15-41	Baltimore Steam Packet Co. Acquisition and Control	583	No	Juris. Reserved [1]

[1] In this case the Commission under section 5(2)(e) imposed a temporary job freeze pending determination of the effect of the transaction upon the carrier's employees. No other case has been found in which even a temporary stay was imposed by the Commission.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13242	5-26-41	Cleveland & R. R. Co. Purchase	244 ICC 793	No	Compensation for 4 years.
12656	5-8-41	Chicago, M., St. P. & P.R. Co. Trustees Operation	247 ICC 1	No	None
13137	5-14-41	Chester & Mt. V. R. Co. Lease	11	No	None
13247	5-27-41	Greenbrier, C. & E. R. Co. Lease	25	No	None
13209	5-31-41	Burlington-R. I. R. Co. Abandonment of Operation	79	No	None
13323	6-28-41	Atchison, T. & S. F. Ry. Co. Merger	173	No	None
13230	6-26-41	Moosic Mountain & C. R. Co. Purchase	241	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
12843	7-8-41	Texas & P. Ry. Co. Operation	247 ICC 285	RLEA et al.	4-year compensation
12859	7-30-41	St. Louis National Stockyards Co. Lease	363	No	None
13235	9-29-41	Wabash R. Co. Control	365	No	Juris. Reserved
13194	8-9-41	Illinois Central R. Co. Operation	415	No	None
13336	8-14-41	Gulf, M. & O. R. Co. Operation	435	No	None
13276	8-25-41	Montour R. Co. Operation	503	No	None
13243	8-25-41	Durham & S. C. Co. Lease	509	No	None
13310	8-25-41	Northern Pac. Ry. Co. Purchase	513	No	Juris. Reserved
13010	7-29-41	Wabash Ry. Co. Receivership	581	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
9033	8-28-41	Texas & N. O. R. Co. Operation	247 ICC 625	No	None
13218	9-2-41	Missouri Pac. R. Corp. in Nebraska Trustee Operation	653	No	None—agreement between parties
13306	8-27-41	Forth Worth & D. C. Ry. Co. Operation	659	No	None
13393	10-3-41	Unadilla Valley Ry. Co. Purchase	249 ICC 1	No	Juris. Reserved
11915	10-3-41	Erie R. Co. Reorganization	279	No	None
13384	10-28-41	Southern R. Co. Purchase	357	No	None
11915	10-27-41	Erie R. Co. Reorganization	413	No	None
13382	10-25-41	State Line & S. R. Co. Control	441	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13475	11-12-41	Wheeling & L. E. Control	249 ICC 490	No	None
13456	11-15-41	Los Angeles Union Stock Yards Co. Lease	499	No	None
13515	11-18-41	Harriman & N. E. R. Co. Abandonment	518	No	None
13377	12-4-41	Missouri Pac. R. Co. Trustee Purchase	568	No	None
13332	12-6-41	Texas & N. O. R. Co. Operation	595	No	None
11915	12-13-41	Erie R. Co. Reorganization	639	No	None
13513	12-6-41	Southern Iowa Ry. Co. Purchase	653	No	None
13551	12-23-41	Franklin & T. R. Control	743	No	None
13555	12-24-41	Boston & M. R. Operation	755	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13541	12-30-41	New York, S. & W. R. Co. Trustee Operation	249 ICC 758	No	None
13554	12-23-41	Boston & M. R. Operation	761	No	None
13550	12-23-41	Boston & M. R. Operation	763	No	None
13497	12-30-41	New York, S. & W. R. Co. Trustee Purchase	777	No	None
13085	1-17-42	Chicago, M., St. P. & P. R. Co. Trustees Construction	262 ICC 49	RLEA	4-year compensation
13385	1-27-42	Kansas City S. Ry. Co. Purchase	113	No	None
13539	2-7-42	Port San Lois Transp. Co. Purchase Operation and Stock	137	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13730	6-8-42	Cuyahoga Valley Ry. Co. Control	252 ICC 683	No	None
13793	8-14-12	Pennsylvania, O. & D. R. Co. Trackage Operation	709	No	None
13496	10-13-42	Pittsburgh, L. & W. R. Co. Purchase	254 ICC 144	No	Juris. Reserved
13956	11-24-42	Atchison, T. & S. F. Ry. Co. Merger	159	Emp.	None
14054	12-29-42	Rio Grande, E. P. & S. F. R. Co. Lease	196	No	None
13496	3-8-43	Pittsburgh, L. & W. R. Co. Purchase	202	No	Juris. Reserved
13610	3-9-43	Stockyards Ry. Co. Control	207	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14491	3-9-43	St. Paul Union Stockyards Co. Lease	254 ICC 215	No	None
14114	7-21-43	Erie R. Co. Purchase	486	No	None
14192	10-15-43	Kansas City Southern Ry. Co. Merger	529	No	None
14367	11-16-43	Wheeling & L. E. Ry. Co. Control	633	No	None
14360	11-26-43	Atlanta & C. A. Co. Bonds	641	No	None
9923	12-27-43	Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization	694	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14433	5-15-44	Delaware, L. & W. R. Co. Merger	257 ICC 91	No	None
14221	5-17-44	Oklahoma Ry. Co. Trustees Abandonment	177	RLEA	Oklahoma conditions
14510	6-28-44	Canton, A. & N. R. Co. Lease	346	No	None
14600	9-12-44	Delaware & H. R. Corp. Merger	453	No	None
14501	9-30-44	Seaboard Ry. Co. Acquisition	584	No	None
14367	10-13-44	Wheeling & L. E. Ry. Co. Control	713	No	None
14706	12-30-44	Columbia & Millstadt R. Co. Purchase	729	Labor Org.	Juris. Reserved
14642	10-21-44	Milwaukee Livestock Handling Co. Control	796	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14802	4-17-45	Fox Purchase	261 ICC 95	No	None
14692	6-5-45	Chesapeake & O. Ry. Co. Purchase	239	No	None
14931	9-19-45	Gulf, M. & O. R. Co. Purchase, Securities	405	RLEA	Washington
14891	11-28-45	Baltimore & O. R. Co. Lease	535	No	None
6790	12-18-45	Nicholas, Fayette & Greenbrier R. Co. Lease	546	No	None
14677	1-3-46	Chicago, B. & Q. R. Co. Abandonment	549	No	4-year compensation
14891	4-11-46	Baltimore & O. R. Co. Operation	615	RLEA et al.	Juris. Reserved
15100	2-5-46	Gulf, M. & O. R. Co. Purchase	623	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
15250	5-29-46	Chicago & N. W. Ry. Co. Merger	261 ICC 672	RLEA	North Western
14500	6-28-46	Seaboard Air Line Ry. Co. Receivership	689	No	North Western
15321	6-21-46	Pere Marquette Ry. Co. Trackage Rights	750	No	North Western
14992	6-26-46	Central R. Co. of Pennsylvania Lease	755	Labor Org.	North Western
15158	8-7-46	St. Louis, S. F. & T. Ry. Co. Trackage Rights	267 ICC 30	Labor Org.	North Western
12859	2-27-47	St. Louis National Stockyards Co. Lease	80	No	None
14931	2-10-47	Gulf, M. & O. R. Co. Purchase, Securities	145	Labor Org.	North Western
15181	12-10-46	Wheeling, & L. E. Ry. Co. Control	163	RLEA	North Western

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14931	3-10-47	Gulf, M. & O. R. Co. Purchase, Securities	267 ICC 201	No	North Western
15181	3-10-47	Wheeling & L. E. Ry. Co. Control	203	No	None
15228	4-1-47	Pere Marquette Ry. Co. Merger	207	RLEA	North Western
14931	5-8-47	Gulf, M. & O. R. Co. Purchase, Securities	265	RLEA	Washington & North Western
15685	6-25-47	Wheeling & L. E. Ry. Co. Control	401	No	None
15711	8-18-47	Southern Pac. Co. Reincorporation	523	No	North Western
15605	12-8-47	Niagara Junction Ry. Co. Control	649	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13085	12-18-47	Chicago, M., St. P. & P. R. Co. Trustees Construction	267 ICC 690	No	4-year compensation
15920	4-7-48	New Orleans Union Passenger Terminal Case	763	RLEA et al.	Oklahoma
16041	5-21-48	Beech Creek R. Co. Control	271 ICC 1	No	North Western
16042	10-7-48	Union Belt Ry. Oakland Control	223	No	North Western
15785	10-20-48	Chicago, B. & Q. R. Co. Abandonment	261	Labor Org.	Burlington
16325	5-5-49	Gulf, M. & O. R. Co. Purchase	659	No	North Western
16395	7-6-49	Chicago, B. & Q. R. Co. Trackage Rights	675	RLEA et al.	Washington & North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
16308	7-21-49	Wheeling & L. E. Ry. Co. Lease	271 ICC 713	RLEA et al.	Washington & North Western
15947	9-9-49	International-G. N. R. Co. Trustee Trackage Rights	275 ICC 27	Labor Org.	Oklahoma
16278	9-19-49	Bessemer & L. E. R. Co. Merger	167	No	North Western
16697	12-14-49	Gulf, M. & O. R. Co. Purchase	197	No	North Western
16592	3-7-50	Houston Belt & Term. Ry. Co. Control	289	Labor Org.	Washington & North Western
16042	4-26-49	Union Belt Ry. of Oakland Control	343	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
16809	6-1-50	Cambria & Indiana R. Co. Control	275 ICC 360	No	North Western
16426	5-2-50	Detroit, T. & I. R. Co. Control	455	RLEA	Washington & North Western
16167	12-5-50	Southern Ry. Co. Purchase	724	No	North Western
15947	5-23-51	International-G.N.R. Co. Trustee Trackage Rights	282 ICC 30	No	North Western
16968	5-10-51	Savannah & A. Ry. Co. Control	39	RLEA	Washington & North Western
17573	1-16-52	Arkansas & L. M. Ry. Co. Control	255	No	North Western
15920	1-16-52	New Orleans Union Passenger Terminal Case	271	RLEA	New Orleans

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
17522	2-20-52	Rockdale, S. & S. R. Co. Operation and Control	282 ICC 297	No	North Western
17584	3-31-52	Chesapeake & O. Ry. Co. Trackage Rights	304	Labor Org.	North Western
16989	3-7-52	Gulf, M. & O. R. Co. Abandonment	311	Labor Org.	Oklahoma
17539	3-25-52	Chicago, R. I. & P. R. Co. Acquisition	344	RLEA et al.	Burlington
12347	3-31-52	New York Connecting R. Co. Trackage Rights	353	No	North Western
17573	7-14-52	Arkansas & L. M. Ry. Co. Control	564	No	None
17134	8-31-51	Pacific Coast R. R. Co. Control	600	Labor Org.	Washington & North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
16690	10-17-52	Gulf, M. & O. Ry. Co. Trackage Rights	282 ICC 689	Previous Rept. Above	
17893	12-12-52	Valdosta S. R. Purchase	705	Labor Org.	Washington, Burlington & North Western
17217	3-2-53	South Western R. Co. Control	714	No	North Western
18118	5-29-53	United New Jersey R. & C. Co. Control	737	No	North Western
17585	8-17-53	St. Louis S. W. Ry. Co. of Texas Abandonment	290 ICC 53	Labor Org.	Oklahoma
17992	8-7-53	Harris County Houston Ship Channel Nav. Dis. Operation	83	No	North Western
17954	10-23-53	Arkansas & L. M. Ry. Co. Construction	112	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
18116	12-18-53	St. Louis S. W. R. Co. of Texas Lease	290 ICC 205	Labor Org.	New Orleans
18180	1-20-54	Sacramento N. Ry. Trackage Rights	229	No	North Western
18540	6-25-54	Arkansas & L. M. Ry. Co. Control	243	No	North Western
18249	7-13-54	South Georgia Ry. Control	281	RLEA et al.	Oklahoma
18163	6-10-54	Wichita Falls & S. R. Co. Abandonment	303	RLEA et al.	Burlington & North Western
9033	8-4-54	Texas & N. O. R. Co. Operation	355	No	North Western
18656	3-2-55	Louisville & J. B. R. Co. Merger	725	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
18540	4-12-55	Arkansas & L. M. Ry. Co. Control	290 ICC 750	No	North Western
18617	9-27-55	Sacramento N. Ry. Trustees Abandonment	295 ICC 73	RLEA et al.	Burlington
18778	11-22-55	Wellsville, A. & G. R. Corp. Purchase and Control	115	RLEA et al.	Oklahoma
19182	8-27-56	Erie R. Co. Trackage Rights	303	RLEA et al.	New Orleans
19329	2-5-57	Wisconsin Central R. Co. Operation	413	No	North Western
9033	10-24-56	Texas & N. O. R. Co. Operation	420	No	North Western
19315	12-20-56	Spokane International R. Co. Control	425	RLEA et al.	North Western
19432	12-28-56	Chicago, St. P. M. & O. Ry. Co. Lease	441	RLEA	Oklahoma

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
18845	3-1-57	Louisville & N. R. Co. Merger	295 ICC 457	Labor Org.	New Orleans
18698	2-12-57	Camp Lejeune R. Co. Securities and Operation	511	No	North Western
18991	5-31-57	Toledo, P. & W. R. Co. Control	523	RLEA et al.	Washington
19159	7-9-57	Central of Georgia R. Co. Control	563	No	North Western
19583	7-23-57	Durham & S. C. R. Co. Control	585	No	North Western
19677	4-14-58	Illinois Central R. Co. Merger	731	No	North Western
19989	7-24-58	Delaware, L. & W. R. Co. Trackage Rights	743	RLEA et al.	New Orleans

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13170	11-3-58	Florida East Coast R. Co. Reorganization	307 ICC 5	RLEA	New Orleans
20026	9-7-59	Chicago S. S. & S. B. R. Trackage Rights	329	No	North Western
20599	10-8-59	Norfolk & W. Ry. Co. Merger	401	RLEA et al.	Stipulated and Oklahoma
19453	12-8-59	St. Johnsbury & L. C. R. Control	489	RLEA et al.	Previous Report
19538	10-5-59	Illinois Central R. Co. Construction and Trackage	493	No	North Western
20852	12-11-59	Atlantic Coast Line R. Co. Merger	614	RLEA	Oklahoma
12347	2-8-60	New York Connecting R. Co Trackage Rights	702	No	Oklahoma

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
20751	3-28-60	Missouri-K-T R. Co. Consolidation	312 ICC 13	RLEA	Oklahoma
20956	4-28-60	Chicago, M. St. P. & P. R. Co. Trackage Rights	75	No	Oklahoma
21024	6-3-60	Winston-Salem Southbound Ry. Co. Control	138	No	Oklahoma
20978	6-24-60	Texas & N. O. R. Co. Merger	147	No	Oklahoma